Petition

81-606

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No. ....

IN THE

Supreme Court of the United States

October Term, 1981

DAVIS & COX, CHESTER C. DAVIS, MAXWELL E. COX, HOWARD M. JAFFE and D. MARTIN COOK,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE J. CHARLES THOMPSON, FIRST NATIONAL BANK OF NEVADA, as Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr. (Deceased), WILLIAM R. LUMMIS, as Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr. (Deceased), and as Texas Temporary Co-Administrator of the Estate of Howard Robard Hughes, Jr. (Deceased), SUMMA CORPORATION, HUGHES AIR CORP. dba Hughes Airwest, and HUGHES PROPERTIES, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA.

(names and addresses of attorneys continued on inside cover)

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Questions Presented.

1. Whether the Nevada Supreme Court unconstitutionally limited the assertion of petitioners' federal rights in holding that non-resident defendants waived their due process rights not to be sued in Nevada by opposing the plaintiffs' motion for leave to amend their complaint (which amendment was sought for the avowed purpose of derogating petitioners' jurisdictional objections) on the ground of prejudice — an argument which included, but was not necessarily limited to, jurisdictional deficiencies?

2. Whether the Nevada Supreme Court further erred in permitting the trial court to make a *de novo* re-determination of the issue of personal jurisdiction despite a prior adjudication in the same action sustaining an identical challenge?

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THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE J. CHARLES THOMPSON, FIRST NATIONAL BANK OF NEVADA, as Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr. (Deceased), WILLIAM R. LUMMIS, as Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr. (Deceased), and as Texas Temporary Co-Administrator of the Estate of Howard Robard Hughes, Jr. (Deceased), SUMMA CORPORATION, HUGHES AIR CORP. dba Hughes Airwest, and HUGHES PROPERTIES, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA.

Petitioners, Davis & Cox, Chester C. Davis, Maxwell

E. Cox, Howard M. Jaffe and D. Martin Cook,[1] respectfully pray that a writ of certiorari issue to review the final judgment of the Supreme Court of the State of Nevada, dated June 26, 1981.

Opinions Below.

The opinion of the Supreme Court of the State of Nevada, denying petitioners' petition in the court below for a writ of prohibition and a writ of mandamus, is reported at 97 Nev. Adv. Op. 115, 629 P.2d 1209 (1981), and is reprinted in Appendix A hereto. The subsequent order of the Nevada Supreme Court denying petitioners' motion for a stay of the remittitur pending this Court's ruling on this petition for a writ of certiorari is reprinted in Appendix B hereto. The Eighth Judicial District Court of the State of Nevada in and for the County of Clark did not issue a written opinion or a written set of findings of facts or conclusions of law: its order denying petitioners' motion to quash service of process on the second amended complaint, dated June 20, 1980, is reprinted in Appendix C hereto. The prior decision of the

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[1]The opinion of the Nevada Supreme Court was rendered in three consolidated proceedings, Nos. 12808, 13012, and 13048. Petitioners are parties only to No. 12808. Other parties to the consolidated proceedings, Frank William Gay, Levar Beebe Myler, and John Morrison Holmes, Jr., have appealed to this Court from the judgment of the Nevada Supreme Court entered in No. 13012. Still other parties to the consolidated proceedings, Howard Lorenzo Eckersley, James H. Rickard, and Wilbur Sutton Thain, M.D., have appealed to this Court from the judgment of the Supreme Court entered in No. 13048. Other parties to the consolidated proceedings are First National Bank of Nevada, as Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr. (deceased), William R. Lummis, as Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr. (deceased), and as Texas Temporary Co-Administrator of the Estate of Howard Robard Hughes, Jr. (deceased), Summa Corporation, Hughes Air Corp., dba Hughes Airwest, and Hughes Properties, Inc.

trial court sustaining petitioners' personal jurisdiction challenge, dated June 8, 1979, is reprinted in Appendix D hereto.

Jurisdiction.

The opinion of the Nevada Supreme Court denying petitioners' petition in the court below for a writ of prohibition and a writ of mandamus, was entered on June 26, 1981. This petition for writ of certiorari is being docketed in this Court within 90 days from that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3). A state supreme court judgment affirming the trial court's denial of a motion to quash service of process for lack of *in personam* jurisdiction meets the finality requirement of 28 U.S.C. § 1257. *Shaffer v. Heitner*, 433 U.S. 186, 195, n. 12 (1977).

Constitutional Provisions Involved.

Fourteenth Amendment, United States Constitution:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article Six, United States Constitution:

This Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

Raising the Federal Question.

The question of whether petitioners had waived their due process right to quash service of process was first raised on April 4, 1980 in the plaintiffs' memorandum in opposition

to the petitioners' motion and to the motion of certain other nonresident defendants[2] to quash service of process on the second amended complaint for lack of *in personam* jurisdiction. On June 2, 1980, petitioners timely filed with the trial court a reply brief addressed solely to the question of waiver, arguing, *inter alia:*

> "Federal rights, such as [petitioners'] due process right not to be sued in this State, may not be waived by the application of state procedures which support no legitimate state function [citations omitted]." Special Reply Brief of the Davis Parties on the Nature of Their Appearances in this Lawsuit, filed with the Eighth Judicial District Court in and for the County of Clark, on or about June 2, 1980, at p. 34.

Thus, the constitutional question was expressly before the trial court when Judge Thompson denied the petitioners' motion to quash service of the second amended complaint.

In both their opening and reply briefs to the Nevada Supreme Court, petitioners renewed their claim that the trial court's finding violated the principle that "a state may not unfairly refuse to permit federal rights to be asserted and determined on their merits."[3] The Nevada Supreme Court denied petitioners' petition in the court below for a writ of prohibition and a writ of mandamus, expressly holding that "petitioners did make a general appearance." Thus, the court below considered and expressly rejected the constitutional claim.

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[2]The six nonresident defendants seeking separate review of the judgments of the Nevada Supreme Court entered in the consolidated proceedings filed a separate motion to quash, based on different factual underpinnings than the motion brought by petitioners.

[3]Petitioners' Opening Brief to the Supreme Court of the State of Nevada, p. 27; *see* Petitioners' Reply Brief to the Supreme Court of the State of Nevada, pp. 17-19.

Statement of the Case.

Petitioners, the former attorneys of the late Howard R. Hughes, Jr., and his companies, are residents of New York and California. Nevada's largest employer, Summa Corporation, along with certain representatives of Mr. Hughes' Estate and other corporate entities they control filed a complaint in Nevada against petitioners and certain of Mr. Hughes' physicians, executives, and personal aides. The complaint alleged an all-encompassing conspiracy to defraud, whereby the defendants purportedly seized control of Mr. Hughes' financial empire.[4] The precise question raised by this petition is whether petitioners waived their due process rights not to be sued in Nevada by opposing the plaintiffs' repeated efforts to amend the complaint in an order to overcome petitioners' jurisdictional objections. The court below was of the view that petitioners, by supplementing their jurisdictional objections with an allegation of the "prejudicial" effect of an order granting the plaintiffs leave to file another amended complaint, strayed out of their safe harbor into uncharted waters in which a State need not accord deference to a timely assertion of federal rights.

Proceedings In The Trial Court.

On January 24, 1979, Summa Corporation, Hughes Air Corp., Hughes Properties, Inc., and certain administrators of Mr. Hughes' Estate (collectively "Summa") filed a complaint against petitioners Davis and Davis & Cox in the Eighth Judicial Court of the State of Nevada in and for the

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[4]These claims are described in detail in No. 80-2137, a Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. In that proceeding, petitioners (petitioners herein) argued that these tort claims (asserted as counterclaims in actions pending in the United States District Court for the Central District of California) failed to comply with Rule 9(b) of the Federal Rules of Civil Procedure.

County of Clark.[5] Petitioners promptly moved to quash service for lack of *in personam* jurisdiction.[6] On June 8, 1979, the Honorable Paul Goldman, Judge of the Eighth Judicial Court, wrote a scholarly opinion (reprinted in Appendix D hereto) granting the motion to quash service of process, on the ground, *inter alia*, that Summa's attempted invocation of the *in personam* jurisdiction of the Nevada court failed to comport with basic principles of federal due process.

Summa neither appealed from nor otherwise sought appellate review of that decision. Instead, Summa filed a first amended complaint against all petitioners.[7] Petitioners moved on August 31, 1979 to quash service of the first amended complaint, citing the *res judicata* effect of Judge Goldman's prior decision, and reiterating their substantive objections to Summa's second attempted invocation of the *in personam* jurisdiction of the Nevada court.[8]

Summa never filed a written response to petitioners' motion to quash. Instead, on October 24, 1979, Summa brought a motion for leave to file a second amended com-

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[5]The First National Bank of Nevada, as Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr., and William R. Lummis, as Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr. and as Texas Temporary Co-Administrator of the Estate of Howard Robard Hughes, Jr., joined as plaintiffs. The named defendants included two former Summa corporate executives (Frank William Gay and Kay Gibbons Glenn), three of Mr. Hughes' physicians (Wilbur Sutton Thain, M.D., Homer Hone Clark, M.D., and Norman Francis Crane, M.D.), and six of Mr. Hughes' personal aides (Levar Beebe Myler, John Morrison Holmes, Jr., Clarence Albert Waldron, Howard Lorenzo Eckersley, James H. Rickard, and George Arthur Francom, Jr.).

[6]Petitioner Davis is a resident of New York. Petitioner Davis & Cox maintains offices in New York and California.

[7]Summa also named its former vice-president, Nadine Henley Marshall, as an additional defendant, and abandoned its claim against George Arthur Francom.

[8]Petitioner Cox is a resident of the State of New York. Petitioners Jaffe and Cook are residents of the State of California.

plaint and to vacate the briefing schedule for petitioners' still pending motion to quash service of process on the first amended complaint. In its moving papers, Summa admitted that the proposed amendments would "significantly alter the scope of the issues" and frankly conceded that its purpose in seeking leave to amend further its complaint was to improve its jurisdictional position vis-a-vis petitioners and *sub silentio* moot their still pending motion to quash.[9] Citing the prejudice that would result from Summa's amendment of its complaint in order to moot their pending motion to quash, and to improve Summa's position on the issue of personal jurisdiction, petitioners, "appearing specially", filed a three-page opposition which addressed only Summa' jurisdictional maneuverings.[10]

On November 20, 1979, Judge Goldman granted Summa leave to file a second amended complaint provided it pay the defendants — including petitioners — the costs they incurred in moving to quash the now inoperative first amended complaint.[11] Summa tendered payment and again amended its complaint.

Petitioners then moved to quash service of Summa's third effort to subject them to the *in personam* jurisdiction of the

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[9]Summa argued:

> "Plaintiffs anticipate that this complaint may avoid entirely Defendants' jurisdictional and Rule 9(b) motions. At the very least, the Second Amended Complaint's specific allegations of Nevada-related conduct require the out-of-state Defendants to bolster their sparse and conclusory jurisdictional motions with more detailed factual allegations addressing the specific issues raised by the new pleading." Motion for Leave to File Amended Complaint and For Extension of Time, filed with the Eighth Judicial District Court on or about October 25, 1979, at pp. 4-5.

[10]Petitioners' Opposition to Summa's Motion for Leave to File Amended Complaint and For Extension of Time is reprinted in Appendix E.

[11]The transcript for the November 20, 1979 hearing is reprinted in Appendix F.

Nevada court. Approximately one month later, Judge Goldman recused himself without explanation, and the case was transferred to the Honorable J. Charles Thompson. Summa opposed the motion to quash, reiterating its contention — previously rejected by Judge Goldman — that petitioners had sufficient contacts with the State of Nevada to justify imposition of *in personam* jurisdiction, and — for the first time — arguing that petitioners had waived their right to assert federal due process objections by opposing Summa's motion for leave to amend further its complaint and by accepting the tender of costs.

On June 20, 1980, Judge Thompson — without issuing a written opinion or making any fact findings — ruled that petitioners had made a general appearance.

Proceedings Before the Nevada Supreme Court.

Petitioners sought a writ of prohibition and writ of mandamus from the Nevada Supreme Court to review the trial court's decision; however, on June 26, 1981, the Nevada Supreme Court denied that petition. On July 9, 1981, petitioners sought from the Nevada Supreme Court an order pursuant to Rule 41 of the Nevada Rules of Appellate Procedure staying the remittitur until this Court had an opportunity to rule on their constitutional claim. However, on July 28, 1981, the Nevada Supreme Court denied this motion, expressly holding that denial of the stay — despite creating for petitioners the Hobson's choice of entering a general appearance by responding to the second amended complaint or acquiescing in the entry of an order of default — would not create "any serious or irreparable injury."

Federal Court Proceedings.

On August 10, 1981, petitioners applied to Justice Rehnquist for an order recalling and staying the remittitur of the Nevada Supreme Court. That application was denied.

Petitioners then petitioned for removal of the Nevada action to the United States District Court for the District of Nevada based on the federal question presented by their counterclaims pursuant to the Employee Retirement Income Security Act of 1974 (ERISA). Summa countered with a motion to remand the action back to the Eighth Judicial District Court, seeking an expedited hearing for that motion. On August 24, 1981, United States District Court Judge Harry Claiborne denied Summa's motion for an expedited decision and ordered the parties to submit papers addressing Summa's motion for remand and petitioners' motion for transfer or stay of the proceedings in accordance with the customary briefing schedule. No decision will be forthcoming on those motions until Judge Claiborne hears oral argument, tentatively scheduled for October 5. Petitioners still have neither filed an answer with, nor otherwise generally appeared before, the Eighth Judicial District Court.

Reasons for Granting the Writ.

The decision of the Nevada Supreme Court unconstitutionally limited petitioners' assertion of an important federal right. Judge Goldman's June, 1979 ruling represented a complete vindication of petitioners' due process rights to quash service of process of the Nevada court. Summa then launched a host of procedural tactics having as their sole end the elimination — through a process of steady erosion — of petitioners' constitutional right not to be sued in the State of Nevada.[12] Petitioners' ignored each maneuver —

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[12]For example, Summa propounded interrogatories to petitioners Chester C. Davis and Davis & Cox simultaneously with the service of its original complaint in February, 1979 and served additional interrogatories and requests for production of documents in December, 1979. In order to preserve their challenge to personal jurisdiction, petitioners have — at their peril — ignored such discovery requests. Also consistent with their assertion of their due process rights, petitioners declined to raise the possible *res judicata* effect of the order of the United States District Court for the Central District of California dismissing the plaintiffs' claims for failure to plead fraud with sufficient particularity. *See* Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in No. 80-2137.

however prejudicial — which did not impair their ability to challenge the *in personam* jurisdiction of the Nevada court. Conversely, the only procedural ploy that petitioners resisted was Summa's effort to bait them into somehow entering a general appearance by repeatedly amending its complaint.

However, the trap had been sprung. Contrary to all prior precedent,[13] the Nevada court held that the defensive activities taken by petitioners to prevent the erosion of their due process rights expressly waived those very rights. In an incredible *tour de force* the court below held that the waiver occurred not because petitioners opposed Summa's motion to amend further its complaint, but because they opposed that motion too vigorously: by coupling an allegation of prejudice with their jurisdictional objections, petitioners waived — so the court reasoned — their federal rights. The inescapable conclusion is that a determined plaintiff may use every tactic imaginable to secure *in personam* jurisdic-

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[13]All previously-reported Nevada cases addressing the question of "waiver of special appearance" limited the application of the waiver doctrine to a defendant's request for relief which — unlike petitioners' actions — went beyond that necessary to protect the *status quo* of his challenge to jurisdiction. *See Alitalia-Linie Aeree v. Second Judicial District Court*, 92 Nev. 638, 556 P.2d 544 (1976) (defendant's filing a petition for removal to federal court did not waive his special appearance); *Brockbank v. Second Judicial District Court*, 65 Nev. 781, 201 P.2d 299 (1948) (defendant's objecting to the sufficiency of the plaintiff's affidavit supporting service of summons did not waive his special appearance); *accord Chitwood v. County of Los Angeles*, 14 Cal.App.3d 522, 92 Cal.Rptr. 441 (1971) (defendant's opposing motion to amend the complaint in order to object to personal jurisdiction did not waive his special appearance).

For the same reason, courts have universally held that a specially appearing defendant who asks for the *costs of bringing the motion to quash* has not requested relief inconsistent with his jurisdictional objection and, therefore, has not entered a general appearance. *Muncie v. Westcraft Corporation*, 58 Wash.2d 36, 360 P.2d 744 (1961); *See* Annotation, "Relief as to Costs or Disbursements as Changing Special Appearance to General Appearance", 102 A.L.R. 224.

tion over a non-resident defendant; however, the defendant acts at his peril in invoking established procedures for resisting such efforts.

Justice Holmes has eloquently expressed the principle that a state may not set procedural traps for the federal rights of the unwary:

> "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal Rights, when plainly and reasonably made, is not to be defeated under the name of local practice . . . ." *Davis v. Wechsler*, 263 U.S. 22 (1923).

For this precise reason, a newly-announced rule of procedure may not be applied retroactively to thwart federal rights. *National Association for the Advancement of Colored People v. Alabama*, 357 U.S. 449 (1958) (State supreme court may not rule, without warning, that mandamus is the exclusive remedy for reviewing court orders after disobedience has led to a citation for contempt). Even if all prior precedent of the state court can be harmonized into a rule requiring adherence to the newly enacted procedure, the State may not insist upon strict compliance if the litigant could not reasonably have foreseen the court's result. *Id.*

Petitioners do not contend that Nevada is constitutionally required to recognize the concept of a special appearance. *See York v. Texas*, 137 U.S. 15 (1890). What petitioners contend is that, once having designated the doctrine of "special appearance" as the exclusive means for challenging *in personam* jurisdiction, Nevada may not eliminate their due process rights through an illusory concept of special appearance which permits unforeseeable, arbitrary decisions in a particular case that a waiver has occurred. *See National Association for the Advancement of Colored People v. Alabama*, 377 U.S. 292 (1964) (State court which

previously had not "applied their rules respecting the preparation of briefs with the pointless severity shown here" may not insist on literal compliance in one particular case); *Cf. Griffin v. Illinois*, 351 U.S. 12 (1956) (once a state decides to create appellate courts, it may not arbitrarily or capriciously deny review of a given case).

The finding of the Respondent Court that petitioners waived their special appearance is precisely that kind of arbitrary, capricious, retroactive application of novel procedural laws that this Court has previously held to be contrary to the due process clause. Accordingly, the decision of the Respondent Court cannot stand under federal law.

Petitioners also contend that the Nevada courts further erred in permitting Summa to challenge twice their due process right not to be sued in the State of Nevada in the face of a prior vindication of the identical right in this very action. Consistent with the prohibition on state efforts to eliminate federal rights, states also should not be allowed to erode federal rights by a lax construction of *res judicata* which permits federal rights to be challenged again and again. Therefore, petitioners would also ask this Court to order the Respondent Court to give *res judicata* effect to Judge Goldman's original determination that the Nevada court lacked *in personam* jurisdiction over them.

Conclusion.

For these reasons a writ of certiorari should be issued to review the judgment of the Supreme Court of Nevada.

Respectfully submitted,

ROBERT F. LEWIS,
R. GAYLORD SMITH,
MARY G. WHITAKER,
JEFFREY A. TIDUS,
LEWIS, D'AMATO, BRISBOIS
& BISGAARD,
HOWARD M. JAFFE,
DAVIS & COX,
Attorneys for Petitioners.

APPENDIX A.

Opinion.

In the Supreme Court of the State of Nevada.

Chester C. Davis, Davis & Cox, a partnership, Maxwell E. Cox, Howard M. Jaffe and D. Martin Cook, Petitioners, vs. The Eighth Judicial District of the State of Nevada, in and for the County of Clark, and the Honorable J. Charles Thompson, Respondents. No. 12808.

Frank William Gay, Levar Beebe Myler and John M. Holmes, Jr., Petitioners, vs. The Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, and the Honorable J. Charles Thompson, Respondents. No. 13012.

First National Bank of Nevada, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr. (Deceased); William R. Lummis, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr. (Deceased) and Texas Temporary Co-Administrator of the Estate of Howard Robard Hughes, Jr. (Deceased); Summa Corporation: Hughes Air Corp., d/b/a Hughes Airwest, and Hughes Properties, Inc., Petitioners, vs. The Eighth Judicial District Court of the State of Nevada, in and for the County of Clark; the Honorable J. Charles Thompson, District Judge, Eighth Judicial District Court; Howard Lorenzo Eckersley; James H. Rickard; and Wilbur Sutton Thain, M.D., Respondents. No. 13048.

Filed: June 26, 1981.

Original Proceedings in Prohibition and Mandamus. Denied in cases 12808, 13012. Granted in 13048.

Lewis, D'Amato, Brisbois & Bisgaard, R. Gaylord Smith, Esq. Los Angeles; Houston, Moran & Kennedy, John T. Moran, Jr., Esq., Las Vegas,
for Petitioners in 12808,

Jolley, Urga & Wirth, Roger A. Wirth, Esq., Las Vegas; Sheppard, Mullin, Richter & Hampton, Terence M. Murphy, Esq., Los Angeles,
for Petitioners in 13012
for Respondents in 13048

Echeverria & Osborne, Peter Echeverria, Esq., Las Vegas; Kindel & Anderson, Malcolm George Smith, Esq., Los Angeles; Parson, Behle & Latimer, Gordon L. Roberts, Esq., Salt Lake City; Fitzgibbons & Beatty, Thomas D. Beatty, Esq., Las Vegas.
for Petitioners in 13048
for Respondents in 12808, 13012.

By the Court, MOWBRAY, J.:

These original proceedings are a consolidation of three cases: in 12808 and 13012, the lower court refused to quash service of process upon petitioners; in 13048, the lower court granted defendant-respondents' motion to quash service of process.

THE FACTS

On January 24, 1979, a complaint was filed by the Nevada Co-Administrators for the Estate of Howard R. Hughes, Summa Corporation, Hughes Air Corporation, and Hughes Properties (hereinafter collectively referred to as "Summa") against the group of aides, physicians, attorneys, and business executives who had attended the late Hughes during the last years of his life. The complaint alleged essentially that the group conspired to seize control of the Hughes' empire for their own financial gain by taking advantage of the trust and confidence Hughes had placed in them.

All petitioners in 12808 and 13012, except Maxwell Cox, Howard Jaffe, and Martin Cook, and the respondents in 13048 were named as defendants in the original complaint. These out-of-state defendants filed motions to quash service

of summons contending that Nevada lacked jurisdiction; the Honorable Paul S. Goldman, District Judge, granted the motions as to petitioners Gay, Myler, Holmes, Davis, Davis and Cox, a partnership, and respondents Eckersley, Rickard, and Thain.

Thereafter, Summa filed a first amended complaint. The defendants again filed motions to quash service of summons, but before the lower court considered these motions, Summa sought leave to file a second amended complaint naming, as additional defendants, petitioners Cox, Jaffe, and Cook. Leave was granted; the second amended complaint was filed on November 28, 1979.

The out-of-state defendants again filed motions to quash service of process. The Honorable J. Charles Thompson, District Judge, to whom the case was then assigned, denied the motions on June 20, 1980, as to petitioners Cox, Davis, Cook, Jaffe, and Davis and Cox, a partnership, number 12808; he also denied the motions as to Gay, Myler and Holmes on November 13, 1980, number 13012; however, on November 14, 1980, the judge granted the motions and quashed service as to respondents Eckersley, Rickard, and Thain, number 13048. From these orders the parties petition this court.

NUMBER 12808

General Appearance

In response to Summa's motion for leave to file a second amended complaint, petitioners filed points and authorities in opposition. They appeared and argued before the court. The lower court ruled that petitioners had waived their special appearance, and had submitted themselves to the jurisdiction of the Nevada court.

This court has considered the issue of general and special appearances a number of times, but never in the context of

opposing a motion for leave to file an amended complaint. We have held that when a defendant seeks relief additional to that necessary to protect him from service of process, he enters a general appearance. Alitalia-Linee Aeree v. District Court, 92 Nev. 638, 555 P.2d 1325 (1976); Deros v. Stern, 87 Nev. 148, 483 P.2d 648 (1971); Havas v. Long, 85 Nev. 260, 454 P.2d 30 (1969); Selznick v. Eighth Judicial District Court, Etc., 76 Nev. 386, 355 P.2d 854 (1960). Petitioners argue that their opposition for leave to amend the complaint was predicated solely upon their assertion that the Nevada court lacked jurisdiction over the defendants; they cite Chitwood v. County of Los Angeles, 92 Cal. Rptr. 441 (Cal.App. 1971). *See also*, Housley v. Anaconda Company, 427 P.2d 390 (Utah 1967).

Our review of the record leads us to conclude otherwise. In resisting the motion petitioners argued that leave to amend should not have been granted because of the prejudicial effect it would have on a related action petitioners had filed in New York against Summa. They also contended that the allegations in the proposed second amended complaint were identical to those in the then filed first amended complaint.[1] During argument before the district court, petitioners' counsel sought attorneys' fees from Summa as a condition for leave to amend the complaint.[2]

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[1]Petitioners argued below: "The proposed second amended complaint presents identical *causes of action* to those presented in the first amended complaint now before the court. The changes effected by the proposed second amended complaint are merely evidentiary — plaintiffs plead numerous disparate evidentiary facts for cosmetic purposes while still failing to allege what defendants told Howard Hughes that was incorrect or what defendants did which was beyond their authority." (Emphasis in original.)

[2]Petitioners' counsel stated: "Rule 15A or B expressly confers upon this court the power to impose conditions and I think the literal terms of that will duly invest you with sufficient power to require plaintiffs to pay me as a condition for permitting them to file something with your Clerk."

We conclude that petitioners did make a general appearance and submitted themselves to the jurisdiction of the district court. "Where the defendant appears, and asks some relief which can only be granted on the hypotheses that the court has jurisdiction of the cause and person, it is a submission to the jurisdiction of the court." Goodwine v. Superior Court of Los Angeles, 407 P.2d 1, 3 (Cal. 1965).

Res Judicata

Petitioners here, and in case number 13012, suggest that the order of Judge Goldman quashing service of summons on the original complaint is res judicata on the issue of in personam jurisdiction. The second amended complaint basically contains the same causes of action as the original complaint. However, the second complaint alleges, with more specificity, the tortious acts which Summa contends occurred in this state. The question presented is whether the previous order quashing service of process is entitled to the finality which evokes the doctrine of res judicata.

An order quashing service of summons may be attacked only through a writ of mandamus. Jarstad v. National Farm Union, 92 Nev. 380, 552 P.2d 49 (1976). It is not a judgment as defined in our rules of civil procedure: " 'Judgment' as used in these rules includes a decree and any order from which an appeal lies." NRCP 54(a). The time limit for filing an appeal, NRAP 4(a), does not pertain to a writ of mandamus; this extraordinary remedy is subject to the doctrine of laches. Buckholt v. District Court, 94 Nev. 631, 584 P.2d 672 (1978). An order quashing service of summons is not treated as an appealable final judgment under our rules of civil procedure.

Petitioners rely on a number of cases which find a direct estoppel to exist on a jurisdictional issue once decided: MIB, Inc. v. Super. Ct. of Los Angeles Cty., 164 Cal.Rptr. 828

(Cal.App. 1980); Radakovich v. Weismann, 359 A.2d 426 (Pa.Super. 1976); Archie v. Piaggio, 245 A.2d 76 (N.H. 1968). However, in each of these cases the order quashing service was directly appealable and it became a final judgment.

Here the order quashing service of process was not appealable and did not obtain the status of a final judgment. The district court did not err in refusing to apply the res judicata doctrine.

NUMBER 13012

Burden of Proof

In addition to the issue of res judicata, the inapplicability of which we discussed in number 12808 and incorporate herein, petitioners argue that the lower court failed to apply the correct burden of proof in determining whether sufficient contacts existed to justify the exercise of jurisdiction: they contend that respondents need to have proved the existence of sufficient contacts by a preponderance of the evidence. The lower court ruled that a prima facie showing of sufficient contacts was sufficient. We agree.

When a challenge to personal jurisdiction is made, the plaintiff in the action has the burden of establishing the existence of jurisdiction. Basic Food Indus., Inc. v. District Court, 94 Nev. 111, 575 P.2d 934 (1978). This burden is met by introducing competent evidence of essential facts which establishes a prima facie showing of the existence of in personam jurisdiction. Morrow v. New Moon Homes, Inc., 548 P.2d 279 (Alaska 1976); Harvel v. District Court in & for County of Jefferson, 444 P.2d 629 (Colo. 1968). Unlike the situation in Basic Food Indus.; Inc., *supra*, where the plaintiff rested solely upon the allegations of the complaint to establish such jurisdiction, our review of the record

in the instant case reveals sufficient evidentiary material set forth in numerous affidavits to satisfy the prima facie standard of proof. The trial judge's ruling was correct.

NUMBER 13048

The respondents in the two previous cases are the petitioners here seeking a writ of mandamus directing the lower court to exercise its jurisdiction over Eckersley, Rickard, and Thain. We again incorporate our discussion and rulings on the issues of res judicata and the proper burden of proof as set forth in case numbers 12808 and 13012.

The Nevada Long-Arm Statute

The lower court quashed service of process on respondents Eckersley, Rickard, and Thain in case number 13048.

Summa, in its complaint, had alleged that the said respondent-defendants had conspired out of the state of Nevada to cause injury to Summa's property located in Nevada. The court based its ruling on its conclusion that Nevada's long-arm statute, NRS 14.065, did not apply under the alleged facts.[3] We do not agree.

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[3]NRS 14.065 provides in pertinent part:

"*Personal service of process on party outside state.*

2. Any person who, in person or through an agent or instrumentality, does any of the acts enumerated in this subsection thereby submits himself and, if an individual, his personal representative to the jurisdiction of the courts of this state as to any cause of action which arises from the doing of such acts:

(a) Transacting any business or negotiating any commercial paper within this state;

(b) Committing a tortious act within this state;

(c) Owning, using or possessing any real property situated in this state;

(d) Contracting to insure any person, property or risk located within this state at the time of contracting; or

(e) Living in the marital relationship within this state notwithstanding subsequent departure from this state, as to all obligations arising for alimony, child support or property settlement, if the other party to the marital relationship continues to reside in this state.

In Certain-Teed Prods. v. District Court, 87 Nev. 18, 23, 479 P.2d 781, 784 (1971), we held:

> "The broad language used in the statute discloses a legislative intention to reach the outer limits of federal constitutional due process. Such phrases as 'transacting any business within this state,' 'negotiating any commercial paper within the state,' 'committing a tortious act within this state,' are almost without restriction or limitation."

The California long-arm statute shows a similar broad intent by permitting jurisdiction to attach when predicated on any ground not inconsistent with federal due process. C.C.P. § 410.10. The California Judicial Council's annual report construing this section concludes that "A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an omission or act done elsewhere with respect to causes of action arising from these effects". Quattrone v. Superior Court for County of Los Angeles, 118 Cal.Rptr. 548, 552 (Cal. App. 1975).

We conclude that it is reasonable and constitutionally permissible to require the respondent-defendants to appear and defend their activities in Nevada where the alleged injuries occurred. As the High Court recently reiterated in World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980):

> "The protection against inconvenient litigation is typically described in terms of 'reasonableness' or 'fairness.' We have said that the defendant's contacts with the forum State must be such that maintenance of the suit 'does not offend "traditional notions of fair play and substantial justice." ' International Shoe Co. v. Washington, *supra*, at 316, quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940). The relationship between the defendant and the forum must be such that it is 'reasonable . . . to require the corporation to de-

> fend the particular suit which is brought there.' 326 U.S., at 317. Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute, *see* McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957); the plaintiff's interest in obtaining convenient and effective relief, see Kulko v. California Superior Court, *supra*, at 92, [419 U.S. 84 (1971)] at least when that interest is not adequately protected by the plaintiff's power to choose the forum, *cf.* Shaffer v. Heitner, 433 U.S. 186, 211, n. 37 (1977); the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies, see Kulko v. California Superior Court, *supra*, at 93, 98." (Citation added.)

The court below erred in granting the motion to quash the service of process.

For these reasons we deny the petitions in numbers 12808 and 13012, and we grant the petition in 13048.

/s/ Mowbray, J.
Mowbray

We concur:
/s/ Gunderson, C.J.
Gunderson
/s/ Manoukian, J.
Manoukian
/s/ Batjer, J.
Batjer
/s/ Springer, J.
Springer

APPENDIX B.

Order.

In the Supreme Court of the State of Nevada.

Chester C. Davis, Davis & Cox, a partnership, Maxwell E. Cox, Howard M. Jaffe and D. Martin Cook, Petitioners, vs. The Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, and the Honorable J. Charles Thompson, Respondents. No. 12808.

Frank William Gay, Levar Beebe Mylar, and John Morrison Holmes, Jr., Petitioners, vs. The Eighth Judicial District Court of the State of Nevada, in and for the County of Clark; the Honorable J. Charles Thompson, District Judge; First National Bank of Nevada, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr.; William R. Lummis, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr. and Texas Temporary Co-Administrator of the Estate of Howard Robard Hughes, Jr.; Summa Corporation; Hughes Air Corp., dba Hughes Airwest; and Hughes Properties, Inc., Respondents. No. 13012.

First National Bank of Nevada, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr., (Deceased); William R. Lummis, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr., (Deceased) and Texas Temporary Co-Administrator of the Estate of Howard Robard Hughes, Jr., (Deceased); Summa Corporation, Hughes Air Corp., dba Hughes Airwest, and Hughes Properties, Inc., Petitioners, vs. The Eighth Judicial District Court of the State of Nevada, in and for the County of Clark; the Honorable J. Charles Thompson, District Judge, Eighth Judicial District Court; Howard Lorenzo Eckersley; James H. Rickard; and Wilbur Sutton Thain, M.D., Respondents. No. 13048.

Filed: July 23, 1981.

Petitioners in cases No. 12808 and 13012, and respondent real parties in interest in case No. 13048, have moved for stays of remittitur pending applications for writs of certiorari in the United States Supreme Court. NRAP 41(b). The effect of staying remittitur, if notice is received by this court that petitions for writs of certiorari have been filed in the United States Supreme Court, would be to stay the effect of our decision in these consolidated cases until the matter is disposed of by the Supreme Court. We do not consider it appropriate to grant the stays requested in the absence of some showing similar to the showing required for issuance of a stay pending appeal in this court. *See* NRAP 8; *see also* Kress v. Corey, 65 Nev. 1, 189 P.2d 352 (1948). This court has reviewed the papers on file in these original proceedings, and we do not perceive any serious or irreparable injury that will occur to the moving parties by denial of the stay; on the other hand, the plaintiffs in the court below may well be prejudiced by the passage of additional time before their cases are heard. On balance, we do not believe that any miscarriage of justice, *id.* at 17, 189 P.2d at 360, will occur by denial of a stay pending application for certiorari. Ac-

cordingly, the motions for stays pending applications for certiorari in cases No. 12808, 13012, and 13048 are denied.

It is so ORDERED.

/s/ Batjer, A.C.J.
/s/ Manoukian, J.
/s/ Mowbray, J.

cc: Hon. J. Charles Thompson, District Judge
Messrs. Lewis, D'Amato, Brisbois & Bisgaard
Messrs. Houston, Moran & Kennedy
Messrs. Jolley, Urga & Wirth
Messrs. Sheppard, Mullin, Richter & Hampton
Messrs. Echeverria & Osborne
Messrs. Fitzgibbons & Beatty
Messrs. Parson, Behle & Latimer
Loretta Bowman, Clerk

Notice in Lieu of Remittitur.

In the Supreme Court of the State of Nevada.

Chester C. Davis, Davis & Cox, a partnership, Maxwell E. Cox, Howard M. Jaffe and D. Martin Cook, Petitioners, vs. The Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, and the Honorable J. Charles Thompson, Respondent. No. 12808.

TO THE ABOVE-NAMED PARTIES:

The decision and opinion of the court in this matter having been rendered on June 26, 1981, and no petition for rehearing having been filed and the motion to stay having been denied.

Notice Is Hereby Given that the opinion and decision rendered herein has, pursuant to Rule 40(a) of the rules of this court, become effective.

Dated this 24th day of July, 1981.

C. R. Davenport, Clerk
/s/ C.R. Davenport

cc:
Messrs. Lewis, D'Amato, Brisbois & Bisgaard
Messrs. Houston, Moran & Kennedy
Messrs. Echeverria & Osborne

APPENDIX C.

Order.

In the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark.

First National Bank of Nevada, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr., (Deceased); William R. Lummis, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr., (Deceased) and Texas Temporary Co-Administrator of the Estate of Howard Robard Hughes Jr., (Deceased); Summa Corporation, Hughes Air Corp., d/b/a Hughes Airwest, and Hughes Properties, Inc., Plaintiffs, vs. Frank William Gay, Chester C. Davis, Nadine Henley Marshall, Davis & Cox, a partnership, Maxwell E. Cox, Howard M. Jaffe, D. Martin Cook, Kay Gibbons Glenn, Levar Beebe Myler, John Morrison Holmes, Jr., Clarence Albert Waldron, Howard Lorenzo Eckersley, James H. Rickard, Wilbur Sutton Thain, M.D., John Does One Through Six; Ajax Corporations One Through Six; and Arle & Baker Partnerships One Through Six, Defendants.

The Motion to Quash Service of Process filed by DEFENDANTS DAVIS & COX, a partnership, CHESTER C. DAVIS, MAXWELL E. COX, HOWARD M. JAFFE and D. MARTIN COOK (bearing the date of January 25, 1980) having been filed with this Court;

The Court having received and thoroughly reviewed memoranda submitted by the parties bearing upon the issue of waiver by these moving Defendants of their special appearance and other issues and good cause appearing therefor,

IT IS HEREBY ORDERED:

1. That the Motion to Quash Service of Process bearing the date of January 25, 1980, filed by Defendants Davis

& Cox, a partnership, Chester C. Davis, Maxwell E. Cox, Howard M. Jaffe and D. Martin Cook should be and the same hereby is denied.

2. That Defendants Davis & Cox, a partnership, Chester C. Davis, Maxwell E. Cox, Howard M. Jaffe and D. Martin Cook should be and hereby are required to file an Answer to the Second Amended Complaint of Plaintiffs, on file herein, within twenty (20) days from the date of this Order, unless within said twenty (20) day period said Defendants shall have filed an Application for Writ of Prohibition with the Supreme Court of Nevada, seeking relief from this Order, in which event the requirement that said Defendants answer shall be stayed pending proceedings in the Supreme Court of Nevada on said Application for Writ of Prohibition.

DATED this 20 day of June, 1980.

J. Charles Thompson
J. Charles Thompson, District Judge
Submitted by:

PETER ECHEVERRIA, Esquire
Echeverria & Osborne
555 South Center Street
Reno, Nevada 89501

/s/ By: Thomas D. Beatty
THOMAS D. BEATTY, Esquire
1829 East Charleston Blvd., #104
Las Vegas, Nevada 89104
Attorneys for Plaintiff

APPENDIX D.

Decision.

In the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark.

First National Bank of Nevada, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr., (Deceased), William R. Lummis, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr., (Deceased), and Texas Temporary Co-Administrator of the Estate of Howard Robard Hughes, Jr., (Deceased), Summa Corp., Hughes Air Corp., dba Hughes Airwest, and Hughes Properties, Inc., Plaintiffs, vs. Frank William Gay, Chester C. Davis, Davis & Cox, a Partnership, Kay Gibbons Glenn, Levar Beebe Myler, John Morrison Holmes, Jr., Clarence Albert Waldron, Howard Lorenzo Eckersley, James H. Rickard, George Arthur Francom, Jr., Wilbur Sutton Thain, M.D., Homer Hone Clark, M.D., and Norman Francis Crane, M.D., Defendants. Case No. A 185995, Dept. No. X, Docket "K".

Filed: June 8, 1979.

APPEARANCES OF COUNSEL

For Plaintiffs:

ECHEVERRIA & OSBORNE
By: Peter Echeverria (Reno, NV)
and
ANDREWS, KURTH, CAMPBELL & JONES
By: Paul E. Harris (Houston, TX)
and
FITZGIBBONS, BEATTY & PHILLIPS
By: Thomas D. Beatty (Las Vegas, NV)

For Defendants:

GAY, MYLER, HOLMES, ECKERSLEY, RICKARD, GLENN and WALDRON:

JOLLEY, URGA & WIRTH

By: Roger A. Wirth and William R. Urga (Las Vegas, NV)

and

SHEPPARD, MULLIN, RICHTER & HAMPTON

By: Terence M. Murphy (Los Angeles, CA)

CHESTER A. DAVIS and DAVIS & COX, A PARTNERSHIP:

HOUSTON AND MORAN

By: John T. Moran, Jr. (Las Vegas, NV)

and

LEWIS, D'AMATO, BRISBOIS & BISGAARD

By: Gaylord Smith (Los Angeles, CA)

WILBUR SUTTON THAIN, M.D.:

BECKLEY, SINGLETON, DE LANOY & JEMISON

By: Rex Jemison (Las Vegas, NV)

HOMER HONE CLARK:

SMITH, O'BRIEN & AVILA

By: Franklin N. Smith (Las Vegas, NV)

and

HANSEN & THOMPSON

By: Ralph Dewsnup (Salt Lake City, Utah)

NORMAN FRANCIS CRANE:

DEANER, DEANER & REYNOLDS

By: J. Douglas Deaner (Las Vegas, NV)

and

PAUL, HASTINGS, JANOFSKY & WALKER

By: Lee G. Paul

MEMORANDUM OPINION

Granting Motions to Quash Service of Process for Lack of Personal Jurisdiction;

Denying Motion for a More Definite Statement.

The named defendants in this action include two Nevada residents and ten domiciliaries of other jurisdictions. The Nevada residents have jointly moved for a More Definite Statement pursuant to NRCP 12(e). Through various motions to quash service grounded upon want of personal jurisdiction, the non-resident defendants contend that considerations of substantive due process coupled with, and independently of, the language of NRS 14.065 place these defendants beyond the so-called "long-arm" jurisdiction of this Court. This memorandum decision will deal with each and all of these various motions.

I. THE COMPLAINT:

This is an action by three corporate entities and the estate of their now-deceased alter ego, Howard Robard Hughes, Jr., for alleged tortious acts committed against Plaintiff's decedent, both directly and personally, and virtually identical wrongs practiced indirectly through the decedent upon his wholly-owned corporations. All three plaintiff corporations are incorporated in Delaware. Plaintiffs Summa Corporation and Hughes Properties, Inc., have their principal places of business in Las Vegas, Clark County, Nevada. Plaintiff Hughes Air Corporation, dba Hughes Air West (an interstate aircarrier) is qualified to do, and does business in Nevada. Nowhere in the Complaint or buttressing affidavits is the legal relationship, if any, between these corporations set forth.

Plaintiffs have chosen to group the various alleged tortious acts into three "counts." Count I is styled as "Breach of Fiduciary Duty to Hughes;" Count II, "Breach of Fi-

duciary Duty to Plaintiff Companies;" and Count III, "Conspiracy;" each of which is preceded by a lengthy narrative which is apparently meant to pass for the "short and plain statement of the claim" called for by NRCP 8(a).

In an efficient, if not ingenious, scheme of pleading, plaintiffs allege virtually identical causes of action in what they have styled as Counts I and II. This feat is accomplished by realleging the narrative contained in paragraphs 1-26 in Counts I and II and the realleging and restating the details of Count I in the body of Count II. Count I itself is merely a restatement of paragraphs 20-26 following the original narrative. In considering the broadest definition of "cause of action," this Court must take cognizance of the fact that plaintiffs have pleaded at least thirty-three separate causes of action. All plaintiffs seek identical relief.

From a careful reading of the Complaint, prior to oral argument, it was this Court's distinct impression that all alleged acts and conspiracies are asserted to have taken place between December 1, 1972, (Complaint Page 4, Paragraphs 20, 21 and 22) and April, 1976. All parties seemed to agree that the decedent left Nevada in 1970. At oral argument, counsel for the plaintiffs, Mr. Echeverria, discussed activities which occurred prior to 1970. Upon questioning by the Court, counsel for plaintiffs admitted that the specific allegations of the Complaint included only activities within the post-1972 period specified in the Complaint.

II. THE MOTIONS TO QUASH:

In considering any challenge to personal jurisdiction in Nevada, the Court's inquiry is dual: (1) is the exercise of jurisdiction affirmatively authorized by the legislature; and (2) are the defendants' activities in the forum sufficient to meet the requirements of due process?

A. The Statute:

Nevada's long-arm statute, NRS 14.065, provides in pertinent part:

* * *

2. Any person who, in person or through an agent or instrumentality, does any of the acts enumerated in this subsection, thereby submits himself and, if an individual, his personal representative to the jurisdiction of the Courts of this state as to any cause of action *which arises from the doing of such acts.*

(a) Transacting any business or negotiating any commercial paper within this state;

(b) *Committing a tortious act within this state;*

* * *

3. *Only causes of action arising from these enumerated acts may be asserted against a defendant in an action in which jurisdiction over him is based on this section.*

* * * (Emphasis Supplied)

NRS 14.065 clearly contemplates that only causes of action "arising from" enumerated "acts" which take place "within" Nevada may be reached by this particular long-arm statute. Plaintiffs have cited and relied upon *Certain-Teed Products Corporation v. Second Judicial District Court,* 87 Nev. 18 (1971) and its progeny for the proposition that NRS 14.065 grants *in personam* jurisdiction in all instances which would not violate fundamental notions of due process; their reliance is misplaced.

In *Certain-Teed Products, supra,* the Supreme Court of Nevada did not interpret the language of the statute itself; the Court's only concern lay in considering the outer limits of personal jurisdiction under long-arm statutes generically, in view of prevailing constitutional standards of substantive due process. Incidental to its discussion of constitutional

standards, the Court did note in regard to the subparagraphs of 14.065(2):

> The broad language used in the statute discloses a legislative intention to reach the the outer limits of federal constitutional due process. Such phrases as "transacting any business within this state," "negotiating any commercial paper within this state," "transacting any business within this State," are almost without restriction of limitation. *Id. at 23.*

Although our legislature made an attempt to "reach the outer limits," its grasp did not connect. Unlike California, the Nevada Legislature did not enact a "catch-all" long-arm statute.[1]

If the Nevada Legislature wished to enact a provision similar or identical to that of California, this Court may only indulge in the presumption that those in Carson City were capable of so doing. Courts may not pass on the wisdom or propriety of legislative enactments; it is the province of the judiciary merely to interpret what the legislature enacts.

Nowhere in *Certain-Teed, Products, supra,* or its progeny, did the Court hold that 14.065's "arising from" requirement was non-restrictive or non-limiting; nor did the Court hold that the third paragraph of the statute is meaningless. Further, *Certain-Teed* contains no suggestion that the Supreme Court of Nevada wishes to become a super-legislature, substituting its wisdom for that of another branch of government in contravention of the doctrine of separation of powers. In any event, the mere fact that the Court has interpreted part of the statute liberally does not necessarily imply that the express, restrictive legislative requirements of the statute may be ignored.

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[1]Cal. Civ. Proc. Code §410.10: A Court of this state may exercise jurisdiction on any basis not inconsistent with the constitution of this state or of the United States.

The Supreme Court of Nevada has interpreted NRS 14.065 in *Certain-Teed Products v Eighth Judicial District Court, supra, Abbott v Harrah*, 90 Nev 321 (1974), *Jarstad v National Farmers Union*, 92 Nev 380 (1976), and *Basic Food Industries, Inc. v Eighth Judicial District Court*, 94 Nev Ad. Op. 34 (1978). In each case, all the claims sued upon arose directly out of the transaction of business in this jurisdiction. Indeed, except in the last-cited case, the basis of the claim sued upon was the single act or contact "within this state" considered for purposes of asserting jurisdiction.

The instant case is clearly distinguishable; this complaint sounds solely in tort. Under our statute, torts must "arise from" more than mere presence; the cause of action must "arise from" the "transaction of business" or the "commission of a tortious act" (not necessarily the tort itself). The tort must *arise from* the transaction of business or an event incidential to the commission of the tort, both of which must take place within Nevada. Our statute has no provisions for jurisdiction over a tort which merely "causes injury within" this state. *Wells Fargo & Co. v Wells Fargo Express Company*, 556 F.2d 406, 417 (9th Cir 1977). For somewhat different reasons, the Nevada Supreme Court held in *Basic Food Industries, Inc., supra*, that a non-forum transaction collateral to an underlying claim arising within this state was not a sufficient basis for jurisdiction even though the foreign transaction caused "effects" within this state.

Thus, for the purposes of satisfying the requirements of NRS 14.065, the plaintiffs' claims must grow out of the defendants' forum activities which may be characterized as either the "transaction of business" or the "commission of a tortious act" *in Nevada. Wells Fargo & Co. v. Wells Fargo Express Company*, 556 F.2d 406 (9th Cir 1977).

Certainly, complaints arising from tortious acts must address themselves only to such acts "within this state."

NRS 14.065 (2) and (3) clearly contemplate that the assertion of jurisdiction as to each cause of action between the same parties must be independently established. NRS 14.065(2) provides that "Any person who . . . . does any of the acts enumerated . . . . submits himself . . . . to the jurisdiction of the courts of this state as to any cause of action *which arises from* the doing of such acts: . . . ." After setting out those acts, subsection (3) continues: "Only causes of action *arising from these enumerated acts may be asserted* against a defendant in an action in which jurisdiction over him is based on this section."

Permissive joinder of claims, once jurisdiction as to one claim is established, is not allowed. Properly asserted jurisdiction in one cause of action may not serve as a bootstrap to pull in a defendant on a second unrelated claim which could not have been maintained in the first instance under 14.065.

It is well-settled in this state that a plaintiff has the burden to establish jurisdiction once it is challenged via an NRCP 12(b)(2) motion. *Basic Food Industries, Inc., v Eighth Judicial District Court*, 94 Nev Ad. Op. 34, p. 3 (1978). Upon such a challenge, the Court may consider the complaint and such buttressing evidence as plaintiff may wish to place before the Court by affidavit or other appropriate means. *Taylor v Portland Paramount Corporation*, 383 F.2d 634 (9th Cir 1967).

In *Basic Food Industries*, the author of the opinion (Justice Gunderson) cited *Amba Marketing Systems, Inc., v Jobar Intern, Inc.*, 551 F.2d 784 (9th Cir 1977), as an example of the type of burden which a plaintiff must bear

in responding to a challenge to the assertion of personal jurisdiction under Nevada's long-arm statute.

Unfortunately, the last-cited case does not aid this Court in determining what role the complaint itself plays, if any, in a decision on whether assertion of jurisdiction is proper.

> Amba could not simply rest on the bare allegations of its complaint but rather was obligated to come forward with facts, by affidavit or otherwise, supporting personal jurisdiction. *Amba supra*, at 787.

Amba, as approved and cited with favor in *Basic Food*, leaves this Court with the impression that the complaint may indeed be considered as the matrix in which the evidentiary matters lie. While it is entirely possible that affidavits may by themselves provide an adequate showing to confer long-arm jurisdiction, the better view would be to consider the complaint as well if the former does not occur. This Court therefore suggests, absent dispositive authority, that a two-step approach would be appropriate: (1) an examination of any factual presentation submitted to justify the assertion of long-arm *in personam* jurisdiction; and (2) comparison of the complaint with such facts to determine whether the totality of facts and allegations can withstand the challenge. "In such a case, facts, not mere allegations, must be the touch stone." *Taylor v Portland Paramount Corporation, supra. Id. at 639*. Included in this approach, of course, must be the consideration of affidavits and other factual presentations made by the challenger(s).

Once challenged, a plaintiff must make only a prima facie showing of jurisdictional facts. *Data Disc, Inc., v. Systems Technology Associates*, 557 F.2d 1280 (9th Cir 1977). A showing of "jurisdictional facts" must affirmatively [sic] that the requirements of NRS 14.065 as interpreted here are met.

B. Due Process:

In *Certain-Teed Products Corporation, supra,* the Supreme Court of Nevada articulated the constitutional parameters of long-arm personal jurisdiction, based upon a single act within the forum state:

> The constitutional concern is whether the transaction of business in Nevada produced effects here of such significance that it is not unfair to allow this state to resolve resulting litigation. In short, are traditional notions of fair play and substantial justice offended? (Citations omitted).
>
> . . . . United States Supreme Court decisions . . . . seem to set forth the criteria defining the outer limits of *in personam* jurisdiction over an out-of-state defendant based upon a single act within the forum. First, the defendant must purposefully avail himself of the privilege of acting in the forum state and of causing important consequences in that state. Second, the cause of action must arise from the consequences in the forum state of the defendant's activities. Finally, the activities of the defendant or the consequences of those activities must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable. *Id. at 23.*

C. Motions to Quash Service:[2]

(Defendants Eckersley, Rickard, Gay, Myler and Holmes)

Because the plaintiffs Summa Corp., and the decedent's estate oppose motions by these defendants with the same

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[2]Counsel for five of the defendants, Mr. Wirth, makes an interesting argument that this Court lacks jurisdiction because the plaintiffs fail to establish the conspiracy alleged was formed in Nevada or more importantly that overt acts occurred here. However, because of the manner in which plaintiffs have realleged and incorporated the entire complaint into the conspiracy count, a threshold question is whether the plaintiffs can carry their burden as to the first two counts. The question of asserting jurisdiction on the conspiracy count is symbiotic and need not be resolved until or unless the Court is satisfied that the first two counts may be maintained. Unless the conspiracy in some manner "arises from" the acts set forth in the other counts, this other question need not be resolved.

affidavit of Paul B. Winn, the Court will consolidate its discussion as to these defendants. At the outset, the Court will note that the plaintiffs Hughes Air Corp., dba Hughes Air West, and Hughes Properties, Inc., have placed no "evidence" before the Court as required by *Basic Food Products v. Eighth Judicial District Court, supra*. Once the jurisdictional challenge is made, such failure to meet the burden requires that this Court grant the motion to quash as to these *plaintiffs*. As earlier noted, plaintiffs have failed to establish any legal relationship between Summa Corporation and the other corporate plaintiffs other than the fact that all were wholly-owned by the decedent. If both corporations are wholly-owned subsidiaries of Summa, an affidavit by Summa would have been sufficient as to these entities. The plaintiffs, however, failed to allege such a connection in the pleadings. Because these two corporations are named parties, the Court may only assume that they are real parties in interest and therefore must carry the weight of their own burdens. The Court is unaware of any support for the proposition that a sole stockholder is the proper plaintiff in a suit for wrongs against the corporation. Absent special circumstances, the real party in interest as to wrongs against a corporation is not the sole stockholder. See, NRCP 17(b), 23.1 and NRS 41.520. Therefore, as between plaintiffs Hughes Air Corp., dba Hughes Air West and Hughes Properties, Inc., and the defendants Eckersley, Rickard, Gay, Myler and Holmes the Motion to Quash by each defendant is granted.[3]

The initial paragraphs of Mr. Winn's affidavit establish that the affiant is competent to establish "facts" germane

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[3]Because of this Court's decision on the merits as to the other plaintiffs, this order is almost parenthetical. However, the same result must be reached as between all remaining defendants and these two plaintiffs. The issue will not be addressed further in this decision.

to questions of personal jurisdiction on behalf of both the decedent's estate and Summa Corporation. From the pleadings, it appears that both plaintiffs are real and neither is a nominal party. The pleadings clearly establish that the plaintiff's decedent was the sole stockholder of Summa.

1. Defendant Howard Eckersley's Motion to Quash:[4]

The affidavit of Mr. Winn is not sufficient to establish even a prima facie case for the assertion of personal jurisdiction over Eckersley. Although the affidavit establishes presence in Nevada during the 1972-1976 period and the transaction of corporate business in Nevada, nothing in the affidavit establishes that the defendant committed any of the "wrongs complained of." 14.065(2)'s "arising from" requirement is not met. The plaintiffs' burden at this stage of the litigation requires that more than mere presence be established.

Therefore, the defendant Eckersley's motion to quash as to the remaining plaintiffs is granted.

2. Defendant James H. Rickard's Motion to Quash:

The Winn affidavit fails to allege anything other than the presence in Nevada for the purpose of attending company meetings. Again, there is no showing of "facts" that any of the wrongs alleged "arise from" the transaction of business in this state or that any tort or element of a tort was committed in this state.

Of special interest is page 10, paragraphs 9 and 10 of the Winn affidavit. These also fail to establish any jurisdictional

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[4]This Court has applied different rationales for reaching its conclusions on the merits of similarly-situated defendants. In so doing, this Court does not suggest that one rationale utilized in reaching the merits in a particular case may not be used in resolving the merits as to any other defendant. This decision must be considered in its entirety.

fact germane to this defendant. There is no suggestion that this defendant was present or participated in the commission of the "alleged wrongs" outlined in that portion of the affidavit. The asserted wrongs took place in Florida and New York. The approval of an employment contract does not establish a tort by the employee.

3. Motions to Quash:[5]

(Defendants Gay, Myler and Holmes)

All three defendants were directors of Summa Corporation. Beginning on page 2 of the Winn affidavit, the activities of Mr. Gay in Nevada are set forth. On page 5, the activities of Mr. Myler germane to these motions are discussed. On page 4, Mr. Holmes' acts in Nevada are set forth. On page 3, the affiant clearly states that on May 15, 1973, the Board, with Gay *present*, discussed and acted upon provisions for insurance benefits for Summa employees, himself included. On November 20, 1973, the Board, with defendants Gay and Holmes *present*, acted upon the granting of holiday pay and "special" bonuses to themselves and other Summa employees. On June 28, 1974, all three defendants were *present* at a meeting which the restructuring of Summa was proposed and discussed. The affidavit does not reveal how each individual voted on each matter before the Board on these occasions. Presumably, if a director *opposed* an action later found to be a breach of a duty to the corporation, he could *not* be held to answer for an alleged "breach."

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[5]Each defendant was licensed in *his corporate capacity* by the Nevada Gaming Commission. Plaintiff contends that such licensing is a basis for assertion of jurisdiction. For reasons which should become obvious, the Court does not consider that contact a sufficient basis to establish personal jurisdiction and will not formally address the issue.

Of all the material included on pages 3, 4, and 5 of the affidavit, only these activities are asserted to be the type of self-dealing, manipulative, and deceptive "wrongs complained of." These "acts" are apparently three of the incidents which supposedly exemplify the types of alleged self-dealing schemes which plaintiffs urge are the heart of this suit.

There is no question that personal jurisdiction might be proper over these directors if they were being sued as officers and directors in their corporate capacities. Here, however, plaintiffs seek relief against these defendants in their individual capacities. This is a suit by a corporation against its former officers. This is not a derivative action.

These defendants are not amenable to the exercise of jurisdiction merely because of their status as directors. In *Wilshire Oil Co. of Texas v Rifte*, 409 F.2d (10th Cir 1969), it was held:

> "[U]nless the agents [of a corporation] transact business on their own account and not on behalf of the corporation, the agents are not engaged in business so as to sustain an application of the long-arm statute to them." *Id. at pg 1281, n. 8.*

Accord, *H. M. Greenspun v Del Webb Corp., et al.*, U.S.D.C., Dist. of Nev. Case No. LV 76-223-RDF, February 27, 1978, *Naseef, et al v "ZZ TOP"*, U.S.D.C. Dist. of Nev., Case No. LV 76-36, RDF, P.3 (October, 1976).

Thus, to establish a prima facie case for personal jurisdiction over these defendants in their individual capacities, facts establishing personal liability must be shown. Here, the plaintiffs fail to establish that these defendants have lost their immunity to process. Although decisions were made during the meetings which might establish a breach of fiduciary duty (self-dealing enterprises, *etc.*,), plaintiffs in the Winn affidavit fail to establish that these defendants

voted for such plans thereby possibly breaching their respective duties to the corporation. Although it may well be that these defendants did approve such schemes with their votes, plaintiffs fail to carry their burden to establish that fact. Facts, not unsupported inferences are necessary to establish a prima facie case.

Although it may be that plaintiffs could establish a prima facie case to bring these defendants within the reach of NRS 14.065, they have failed to do so here.[6]

Even if these defendants could be reached technically by the long-arm of NRS 14.065, it might violate due process to assert jurisdiction over them. In summarizing U.S. constitutional concerns in *Certain-Teed Products, supra,* the Court held:

> Finally, the activities of the defendant or the consequences of those activities must have a substantial enough connection within the forum to make the exercise of jurisdiction over the defendant reasonable. *Id. at 23.*

In so examining paragraphs 28, 29, 31 and 32 of the Complaint, this Court must conclude that it would offend "traditional notions of fair play and substantial justice" to resolve this litigation in this forum. Plaintiffs' affidavit clearly establishes that relatively few of the acts alleged occurred in Nevada. In *L.D. Reeder Contractors v Higgins Industries, Inc.,* 265 F.2d 768, 774, n. 12 (9th Cir 1959), the Court noted that the reasonableness of a forum state's jurisdiction in asserting personal jurisdiction over a nonresident defendant may be tested under standards analogous to those of *forum non conveniens*. Here, all of the defendants

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[6]The issue concerning defendant Holmes' federal conviction will be dealt with at length in this decision in the discussion of Dr. Crane's amenability to process. It will suffice to say here that this Court does not consider the fact of conviction at all probative.

reside in either California or Utah. Although personal jurisdiction determinations should not be based solely on plaintiff's ability to sue elsewhere, it is relevant that the burden on a plaintiff to sue in several places on $50 million claims is relatively small.

On these few "*facts*", it is not fair to make these defendants answer here when these activities occurred all over the Western Hemisphere. Although Nevada certainly has an interest in providing a forum for these plaintiffs, due process requires that the plaintiffs make more than a faint effort affirmatively showing that personal jurisdiction would be reasonable. In this regard, the plaintiffs' showing is not sufficient.

D. Motion to Quash:[7]

(Defendant Homer Hone Clark)

In support of his Motion to Quash, Dr. Clark stated in his affidavit: "that to the best of his recollection he was not in the State of Nevada during the period of time from December, 1972, to April, 1976, except for vacation periods *or for stop overs incidental to travel.*" (Clark affidavit, pg. 2, paragraph 2.) Plaintiff's former counsel failed to include that particular and *crucial* paragraph of Dr. Clark's affidavit in its opposition to Clark's motion. On page 2 of "Plaintiff's Opposition To Motion To Quash Of Defendant Homer Clark", plaintiff's former counsel wrote:

> In particular, he swore under oath ".... that he was not in the State of Nevada during the period of time

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[7]As to the physician-defendants, Clark, Thain and Crane, the plaintiffs make the argument that the confirmation upon each of a right to practice medicine in Nevada is sufficient to confer jurisdiction over each. For reasons which should be clear upon consideration of this decision, the Court does not consider the argument at all apposite.

> from December, 1972, to April, 1976, except for vacation purposes . . ." (pg. 2, lines 12-15).

After deleting the crucial phrase "or for stop overs incidental to travel" (Clark affidavit, pg. 2, paragraph 2) from the above-quoted passage, plaintiff's former counsel went on to argue at page 2, lines 26-31:

> Taking defendant Clark at his sworn word that he was never in Nevada during the December, 1972 to April, 1976 period except for vacations, he evidently was vacationing in Las Vegas, Nevada during his January 1, 1976 stay at the Sands Hotel and thereafter billed Summa Corporation for his own personal expenses in connection therewith.

This misrepresentation is again utilized on page 8, note 4, of these Points and Authorities. Plaintiffs' former counsel then attempted to establish a prima facie case for the assertion of personal jurisdiction over this defendant. By attaching as "Exhibit B" billings to Summa (for reimbursement) made by the defendant for lodging, food, and other expenses incurred at the Sands Hotel, plaintiff contends that the action of seeking reimbursement was one of the "wrongs complained of" (charging personal expenses to company expense accounts) in the plaintiffs' complaint. (Complaints paragraph 31(c) p 8).

In opposition to this misstatement, defendant Clark in a Second Supplemental Affidavit clarified the effect of the omitted phrase "or for stop overs incidental to travel." In paragraphs 3-12 inclusive, the defendant established that he did bill Summa on his "stop over [in Las Vegas] incidental to travel" to the Bahamas to treat the decedent; that he had been instructed to travel to Las Vegas from Salt Lake City to board a special flight to carry the defendant to the Bahamas; that the expenses incurred were incidental to his employment with Summa.

Given an opportunity at oral argument to supplement the omissions of former counsel, plaintiff's present counsel of record chose not to comment further.

In considering the "evidence" presented by the parties, the Court must disregarrd the misleading "evidence" presented by the plaintiff and consider it in its *full form* as supplemented by the defendant's affidavits. In considering the "evidence," a prima facie showing of jurisdictional facts is clearly not established. Mere presence on one occasion and nothing more is really alleged. There is no competent *prima facie* evidence that the cause of action against this defendant "arises from" the transaction of any business within the state or the commission of any tortious act.

Therefore, the defendant Homer Hone Clark's Motion To Quash is granted.

E. Motion to Quash:

(Defendant Wilbur S. Thain)

Plaintiffs oppose this defendant's motion with the same affidavit of Paul B. Winn utilized in opposition to the motions of the defendants, Gay, Myler, Holmes, Eckersley, and Rickard. Plaintiffs contend that allegations appearing at pages 5, 6, 7, and 8 of the affidavit constitute a prima facie showing of jurisdictional facts. Dr. Thain has submitted a counter-affidavit which essentially puts at issue the allegations of the complaint. A Court may not "weigh" the affidavits to resolve the disputed jurisdictional facts; this Court has neither the mechanism nor the power at its disposal to allow discovery to aid in determining whether it has jurisdiction. Cf. *Wells Fargo & Co., v Wells Fargo Express Co., supra,* at 430, n. 24 (9th Cir 1977). Thus, a Nevada Court may not put the jurisdictional facts to the test by an evidentiary hearing to allow a determination under

a higher standard of proof, *i.e.*, a preponderance of the evidence.

Because available proof is limited to affidavits and the like, the Court must, and does, accept as true the affidavit of Mr. Winn. In *Data Disc, Inc., v Systems Technology Associates*, 557 F.2d 1280 (9th Cir 1977) the Court held:

> . . . if a plaintiff's proof is limited to written materials, it is necessary only for these materials to demonstrate facts which support a finding of jurisdiction. *Id. at 1285*.

This Court has no authority to allow discovery or an evidentiary hearing when the facts bearing on the question of jurisdiction are controverted. See, *Data Disc, Inc., supra*, p. 1285, n. 1. If the Court were to allow contradictory evidence to serve as the basis for denying jurisdiction, every out-of-state defendant could easily escape from the long-arm of Nevada Courts. Therefore, the Court of its own notion must strike from its consideration contradictory portions of the opposing affidavit. The Court does so recognizing that:

> Because there is no statutory method for resolving this issue [jurisdiction], the mode of its determination is left to the trial court. *Id. at 1285*.

Here, the uncontradicted portions of the Winn affidavit arguably make a showing of jurisdictional facts. The affiant incorporates bills, statements, checks, *etc.* obtained from the defendant's expense voucher file. The affidavit, however, fails to demonstrate, or in any manner suggest, that any of the disbursements made by the plaintiffs to the defendant were in any sense wrongful, self-dealing or obtained by a breach of any duty. Although an affidavit stating only legal conclusions would not be competent, more must be shown than what is here set forth. Facts allowing the Court to draw reasonable inferences on the wrongfulness of the

conduct would suffice. In considering the issue of "pet projects" raised by Mr. Winn, the plaintiffs fail to show or suggest that the alleged "pet projects" were in any sense a waste of corporate assets, or inimical to plaintiffs' interests.

As to the cause of action for medical malpractice, this Court is not of the opinion that such an action may be maintained in Nevada Courts on these "facts." This conclusion is reached through two approaches: (1) NRS 14.065 (2) and (3) clearly contemplate that the assertion of jurisdiction as to each cause of action between the same parties must be independently established. Properly asserted jurisdiction in one cause of action may not serve as a bootstrap to pull in the defendant on a second, unrelated claim which in the first instance could not have been independently maintained under NRS 14.065. (2) "Single act" due process would prohibit such an assertion of jurisdiction. Contacts with the forum required to satisfy the general jurisdictional standard for "presence" within the state may be easily confused with the less-stringent "minimum contacts" test for limited long-arm jurisdiction. *Wells Fargo Company, supra*. In the absence of a restrictive statute, the requirements of due process allow the assertion of jurisdiction over a greater range of activities and types of claims:

> If the non-resident's activities within a state are "substantial" or "continuous and systematic", there is a sufficient relationship between the defendant and the state to support jurisdiction even if the cause of action is unrelated to the defendant's forum activities. *Data Disc, Inc., supra*, at p. 1287.

Absent a restrictive statute, then unrelated claims could have been brought. However, in proceeding under the Nevada long-arm statute, only causes of action which "arise from" the enumerated acts may serve as the basis of jurisdiction.

Here, it may not be said that the claim for medical malpractice arises from conduct in the forum.

Therefore, the defendant Wilbur S. Thain's Motion to Quash is granted.

F. Motion to Quash:

(Defendant Norman Francis Crane)

In his affidavit supporting the Motion to Quash, Dr. Crane contends that he entered into an oral contract in California to provide future medical services to the decedent in 1962. At that time, both the affiant and the decedent were residents of California (Crane affidavit, pg. 2, paragraph 4). Dr. Crane did treat Mr. Hughes in Nevada during a period beginning in 1966 and continuing through 1970 when the decedent left Nevada. After Mr. Hughes left Nevada, this defendant did not return except in 1976 to visit friends in Northern Nevada. (Paragraph 9.) After the decedent's death in April, 1976, the defendant executed a written consultation agreement with Summa Corporation. The procuring and performance under this contract is alleged to be one of the "self-dealing" wrongs resulting in a "breach of fiduciary duty" to the corporation and the decedent. The contract was negotiated and executed in Los Angeles, California, in December, 1977. (Paragraph 10.)

None of these facts are contradicted by any evidence submitted by the plaintiff. Plaintiffs include a copy of the contract, incorporated in an affidavit of the controller of Summa Corporation. The plaintiffs' affiant also establishes that the pay-out under the contract is over a twelve-year period. The plaintiffs' affiant does not establish any facts concerning the procuring of the contract; nor are facts established from which an inference of overcompensation may be established.

Plaintiffs also attach as exhibits federal court criminal records concerning the conviction of defendants Holmes and Crane for conspiracy to violate narcotics and drug laws. The plaintiffs would have this court attach some *res judicata* effect or significance to the indictment's charge that these defendants conspired "Beginning [in] 1955 and continuing until . . . . April 29, 1974, in the District of Nevada and elsewhere." the defendants entered pleas of nolo contendere.

Plaintiffs ask this Court to utilize the "fact of conviction" as a "fact" to establish a prima facie showing of jurisdiction. Counsel for the parties have briefed and argued the issue extensively. The Court need not reach this question of the permissible use of these nolo contendere pleas. The Court notes that even if it were so inclined, the "Overt Acts" portion of the Indictment fails to allege any acts in Nevada during the 1972-1976 period. Federal criminal *venue* for a criminal conspiracy under federal law is not probative in establishing a prima facie showing of jurisdictional facts under a state's long-arm statute.

Even if the pre-1972 contacts with Nevada could be utilized to establish a prima facie showing, these plaintiffs have placed no facts before the Court to establish that what they argue to be prior tortious acts are a part of a continuous scheme of tortious conduct. Although the pre-1972 acts were in violation of federal law, there is no suggestion that these acts were tortious or, conceptually were not done with civilly-acceptable consent. Viewed in that light, the tortious acts in the post-1972 period do not arise from earlier wrongful conduct and no nexus between the periods is reasonably established. There is a failure to demonstrate any facts showing that the alleged tortious conduct of this defendant arose from the "transaction of business" in or the "commission

of a tortious act within this state'' during the 1972-1976 period.

Dr. Crane's consulting agreement does not form a sufficient independent basis for the assertion of jurisdiction over him. Although the obtaining of benefits of a wrongfully-procured agreement is itself a tortious act, the obtaining of benefits without the act of wrongfully procuring fails to state cause of action. Here, the plaintiffs fail to demonstrate any fact or circumstance from which an inference of wrongful procurement may be reasonably inferred. The uncontroverted fact extant is that the contract itself was neither negotiated nor executed here. Although one party is a Nevada resident there is no suggestion that there was any performance or transaction contemplated in this forum, *i.e.*, Nevada.

Therefore, the defendant Norman Francis Crane's Motion to Quash is granted.

G. Motion to Quash:

(Defendants Chester C. Davis and Davis & Cox, a Partnership)

In the interest of belated brevity, the Court in reaching the merits will simply incorporate a great deal of the more detailed rationale utilized in its decision as to the defendants Gay, *et. al.*, and Thain.

For the purposes of this discussion the Court will differentiate between an alleged cause of action for legal malpractice and other claims against these defendants which elude a ready categorization.

It is very possible that a prima facie case could be established for legal malpractice sufficient to hold these defendants to answer in Nevada Courts. There were acts of legal representation within the forum during the relevant period from which a cause of action might arise. Here, no

prima facie case is established; the mere fact of representation is not a sufficient basis for retaining jurisdiction when the same is challenged. Under the Court's reasoning expressed in this decision, no facts permitting the slightest inference of wrongful conduct are set forth. Because of the failure of plaintiffs to carry their slight burden, this Court reserves for another occasion any judgment on the skillfully made argument (pg. 14, Defendants' Reply Points) that the contacts of these legal representatives in their capacities as legal agents of the corporation do not provide a permissible basis for the assertion of personal jurisdiction. As to all other possible plaintiffs the proposition is sound; as to the agent's principal, the efficacy of the rule is questionable.

The affidavit of Paul B. Winn also fails to establish a sufficient showing that the assertion of personal jurisdiction over the defendant Davis on the other "breach of corporate fiduciary duty" claims is not sufficient for the same reasons set forth in the earlier discussion of the motions of Gay, *et. al*. As counsel notes (at page 15 of the Reply Points), there is no competent evidence demonstrating that the representatives' forum activities "were perpetrated in violation of [their] fiduciary dut[ies] to the principal and in furtherance [sic] [their] individual interest[s]."

As to any and all other causes of action which might be extricated from the complaint by dint of imagination, the defendants' Motions to Quash are granted.[8]

The motions of defendants Chester C. Davis and Davis & Cox are therefore granted as to all causes of action.

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[8]The Court has established in its discussion of Dr. Thain's Motion that the requirements of the statute as to each cause of action must be independently established.

III. MOTION FOR A MORE DEFINITE STATEMENT (DEFENDANTS GLENN AND WALDRON)

The Court believes that the complaint is not sufficiently unintelligible to preclude a response. The Court adopts the reasoning and authority set forth in "Plaintiffs' Points and Authorities in Opposition to Defendants Glenn's and Waldron's Motion for a More Definite Statement." Although it does not speak well of notice pleading to allow a complaint of this nature to stand in its present form, the law is clear and this Court feels bound to follow it. Another Rule 12 motion might have been more appropriate.

The Motions of both defendants are therefore denied.

DATED THIS 8TH DAY OF JUNE, 1979.

/s/ Paul S. Goldman
PAUL S. GOLDMAN
District Judge

APPENDIX E.

Opposition to File Motion for Leave to File Second Amended Complaint and for Extension of Time.

In the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark.

First National Bank of Nevada, Nevada Co-special Administrator of the Estate of Howard Robard Hughes, Jr., (Deceased), et al., Plaintiffs, vs. Frank William Gay, et al., Defendants.

Filed: Nov. 15, 1979.

Defendants CHESTER C. DAVIS, DAVIS & COX, MAXWELL E. COX, HOWARD M. JAFFE and D. MARTIN COOK ("the attorney defendants") oppose plaintiffs' motions (1) for leave to file yet another complaint, and, (2) to extend the time for their response to the long since filed motion to quash service of process by the attorney defendants.

1. *THE MOTION FOR LEAVE TO AMEND SHOULD BE DENIED BECAUSE IT UNDULY PREJUDICES THE ATTORNEY DEFENDANTS, IS UNSUPPORTED BY ANY SHOWING AS TO WHY ANY NEW MATERIAL COULD NOT HAVE BEEN ADDED EARLIER, AND NEGLECTS TO INDICATE WHAT HARDSHIP IF ANY PLAINTIFFS WILL INCUR IF LEAVE TO AMEND IS DENIED.*

The attorney defendants oppose the motion for leave to amend on the grounds that the proposed second amended complaint contains nothing that could not have been pleaded in the original complaint, and is therefore simply a tactical ploy to delay the determination on pending motions to quash service of process until certain related proceedings in New York are concluded.

The pertinent principles in determining when leave to amend may be granted or denied are well settled. If the threat of prejudice to the defendant is sufficient, leave to amend the complaint must be denied.

> "Thus, the facts of each case must be examined to determine if the threat of prejudice is sufficient to justify denying leave to amend. In order to reach a decision on this point, the court will consider the position of both parties and the effect the request will have on them. This entails an inquiry into the hardship to the moving party if leave to amend is denied, the reasons for the moving party failing to include the material to be added in the original pleading, and the injustice resulting to the party opposing the motion should it be granted." *Wright and Miller*, 6 Federal Practice and Procedure, §1487, p. 429.

As detailed in the accompanying Affidavit of R. Gaylord Smith, a motion to quash the first amended complaint was filed by these attorney defendants in September 1979. Thereafter, the attorney defendants granted plaintiffs at the request of their attorneys, several extensions of time to respond to their motion. All that the attorney defendants asked in return was one thirty-day period of time to prepare reply papers once plaintiffs' response to the jurisdictional motion, [sic] pursuant to the above referenced stipulation, was October 30, 1979.

It is apparent that plaintiffs have refused to honor the previously stipulated to briefing schedule in order to enhance their position in a pending motion to transfer venue in the New York litigation commenced by Chester C. Davis against Summa. In that motion to transfer, Summa seeks to have the New York litigation moved from Davis' home turf to Summa's. Obviously, another determination by this court that Chester Davis and the other attorney defendants

are not subject to personal jurisdiction in Nevada would seriously compromise Summa's position in connection with the motion to transfer proceedings now pending in New York.

The proposed second amended complaint presents identical *causes of action* to those presented in the first amended complaint now before the court. The changes effected by the proposed second amended complaint are merely evidentiary — plaintiffs plead numerous disparate evidentiary facts for cosmetic purposes while still failing to allege what defendants told Howard Hughes that was incorrect or what defendants did which was beyond their authority. Plaintiffs have failed to state why this evidentiary detail has any place in a pleading subject to Nevada's modern notice-pleading rules; nor is there any attempt whatsoever to justify plaintiffs' failure to include this irrelevant evidentiary detail in the two previous complaints.

2. *CONCLUSION*

The motions of the plaintiffs should be denied in all respects.

DATE: November 5, 1979.

Respectfully submitted:

Robert F. Lewis
Christopher P. Bisgaard
R. Gaylord Smith
LEWIS, D'AMATO, BRISBOIS & BISGAARD
HOUSTON, MORAN & KENNEDY
/s/ By R. Gaylord Smith
R. GAYLORD SMITH
Appearing Specially for Defendants
Davis & Cox, Chester C. Davis,
Maxwell E. Cox, Howard M. Jaffe
and D. Martin Cook

Affidavit of R. Gaylord Smith in Opposition to Motion for Leave to Amend and for Extension of Time.

In the Eighth Judicial District Court of the State of Nevada in and for the County of Clark.

First National Bank of Nevada, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr., (Deceased). William R. Lummis, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr., (Deceased), and Texas Temporary Co-Administrator of the Estate of Howard Robard Hughes, Jr., (Deceased), Summa Corp., Hughes Air Corp., d/b/a Hughes Airwest, and Hughes Properties, Inc., Plaintiffs, vs. Frank William Gay, Chester C. Davis, Davis & Cox, a partnership, Kay Gibbons Glenn, Levar Beebe Myler, John Morrison Holmes, Jr., Clarence Albert Waldron, Howard Lorenzo Eckersley, James H. Rickard, George Arthur Francom, Jr., Wilbur Sutton Thain, M.D. and Norman Francis Crane, M.D., Defendants.

Filed: Nov. 15, 1979.

I, R. GAYLORD SMITH, being duly sworn, do depose and say:

1. I am an attorney associated with the law firm of LEWIS, D'AMATO, BRISBOIS & BISGAARD, counsel of record for CHESTER C. DAVIS, DAVIS & COX, MAXWELL E. COX, HOWARD M. JAFFE, and D. MARTIN COOK, not only in this case, but in various other actions now pending in California and New York.

2. This affidavit is made in opposition to plaintiffs' motions (1) for leave to amend the complaint and, (2) for an extension of time to respond to the pending jurisdictional motions by these attorney defendants.

3. It is not the practice of either myself or my firm to withhold the normal courtesies which are necessary some-

times to assure the expeditious handling of litigation and to accommodate the busy schedules of attorneys and parties. Nonetheless, there comes a time, when after repeatedly extending courtesies to the other side, the prejudice to the client becomes unacceptable. This point has been reached here.

4. On September 4, 1979 I caused to be filed the various motions to quash service of process by the attorney defendants. Thereafter, plaintiffs requested and received several extensions of time in which to respond to these motions; the last granted extension provided that plaintiffs' response would be received October 31, 1979. Since this in effect had provided plaintiffs with almost two full months in which to prepare a response to the jurisdictional motions, my clients requested and received from plaintiffs a stipulation providing that a reply to plaintiffs' response would be filed by November 30, 1979.

5. There is currently pending in New York a federal action instituted by Chester C. Davis against Summa Corporation and William R. Lummis arising out of Summa's failure to recognize and discharge a number of its obligations under the 1961 agreement, which agreement has been briefly described in several of the affidavits on file herein by Mr. Davis. Summa has filed a motion to transfer that action to Nevada, and that motion is returnable November 19, 1979. A matter of considerable embarrassment to Summa in its papers in support of that New York motion to transfer — and a matter of considerable usefulness to these attorney defendants in their papers opposing the motion to transfer — is the fact that this court has already once ruled that Mr. Davis and Davis & Cox cannot be served under the Nevada long arm statute with respect to the causes of action described in the original complaint. It is of paramount interest to Summa in the New York action to keep this Nevada

action alive until the New York judge has an opportunity to render a decision on its transfer motion. It would be a deathknell to Summa's transfer motion in New York if this court were to reaffirm its prior ruling that the Nevada long arm statute still does not apply to the attorney defendants. Hence the procedural maneuvering by plaintiffs to delay the day of reckon [sic] on the motions to quash.

Sworn to this 13th day of November, 1979, at Los Angeles, California.

/s/ R. Gaylord Smith
R. GAYLORD SMITH

Subscribed and sworn to before me
this 13th day of November, 1979.
/s/ Pamela J. Angerer
NOTARY PUBLIC

APPENDIX F.

Reporter's Transcript of Proceedings.

In the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark.

First National Bank of Nevada, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr., (Deceased) William R. Lummis, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr., (Deceased) and Texas Temporary Co-Administrator of the Estate of Howard Robard Hughes Jr., (Deceased); Summa Corporation, Hughes Air Corp., d/b/a Hughes Air West and Hughes Properties Inc., Plaintiffs, vs. Frank William Gay; Chester C. Davis, Nadine Henley Marshall; David [sic] & Cox; a partnership, Maxwell E. Cox, Howard M. Jaffe; D. Martin Cook; Kay Gibbons Glenn; Levar Beebe Myler; John Morrision [sic] Holmes, Jr.; Clarence Albert Waldron; Howard Lorenzo Eckersley; James H. Richard [sic]; Wilbur Sutton Thain, M.D.; Homes [sic] Hone Clark, M.C. [sic]; Norman Francis Crane, M.C. [sic]; John Does I-VI; Ajax Corporations I-VI; and Able & Baker Partnerships I-VI, Defendants. Case No. A 185995, Department Ten.

Before the Honorable Paul S. Goldman, District Judge. Tuesday, November 20, 1979, 9:00 A.M.

APPEARING:

For the Plaintiffs:

ECHEVERRIA & OSBORNE
555 South Center
Reno, Nevada
BY: PETER ECHEVERRIA, ESQ.

and

FITZGIBBONS & BEATTY
1829 East Charleston Boulevard
Suite 104
Las Vegas, Nevada 89104
BY: THOMAS D. BEATTY, ESQ.

For the Defendants: (Chester C. Davis, Davis & Cox, Maxwell E. Cox)	R. GAYLORD SMITH, ESQ. 555 South Center [sic] Reno, Nevada [sic]
For the Defendants: (Henley Marshall, Kay Glenn and Clarence Waldron)	JOLLEY URGA & WIRTH 302 East Carson Avenue Suite 310 Las Vegas, Nevada 89101 BY: ROGER A. WIRTH, ESQ.

Las Vegas, Nevada, Tuesday, November [illegible] 1979, 9:00 A.M.

* * * * *

THE COURT: This is Case No. A 185995, First National Bank of Nevada, et al., plaintiffs, versus Frank William Gay, Chester C. Davis, et al, defendants.

Gentlemen, if you would state your appearances for the reporter.

MR. ECHEVERRIA: Peter Echeverria with the firm of Echeverria & Osborne representing the plaintiffs.

MR. BEATTY: Thomas Beatty assisting Mr. Echeverria.

MR. SMITH: Representing Chester C. Davis from the law firm of Davis & Cox [sic], partner D. Martin Cook, Maxwell E. Cox, Howard M. Jaffee [sic].

MR. WIRTH: Roger Wirth from the firm of Jolley, Urga & Wirth representing in this motion only the following defendants, Glenn Waldron [sic], and Henley Marshall.

MR. ECHEVERRIA: We are here on a motion pursuant to Rule 15 A to amend our pleadings heretofore filed, filing a Second Amended Complaint.

I think we are here particularly under the second sentence of 15 A, first sentence. It may be a matter of course.

No response has been filed. Parties amending the pleading can only do so by leave of court or written consent of adverse party and leave can be freely given when justice so requires.

Attached to our motion, Your Honor, is a letter that I wrote to all the defense counsel in the case asking if they would consent to the filing of the Amended Complaint pursuant to the second sentence of 15 A. Not being able to secure that consent, we filed the motion before the court.

I think it might be helpful to review the history of the matter. The brief history is kind of a moving history.

The reason I want to do that is because the cases that have been relied upon by the defendants in this case cite cases which a long period of time has elapsed before any more evidence came in.

The Nevada case of Churchill County, in that particular case, the case had been at issue for a long period of time. The morning of the trial, they had a pretrial conference with the court. Nothing had been indicated during the pretrial conference that there was going to be amendments to the pleadings at the time.

During the course of the examination of the defendant, adverse witness questions were addressed to him about fraud and misrepresentations. When objections were made, he sought leave to amend and the court didn't grant it.

Also upon the court rely cases [sic] which parties come up to the eve of trial after discovery has been completed, all responsive pleadings set forth, and try to make these amendments. Our case is vastly dissimilar.

The history goes something like this. In January of this year, we filed the first Complaint. We had hearings upon the motions attacking jurisdiction and Your Honor gave a very hard worked opinion [sic] to us in June of 1979 and set forth the basis upon which you dismissed and quashed some of the items in that case. Within thirty days, we filed a First Amended Complaint after granting leave to the defendants to file further pleadings and attach [sic] to the jurisdiction in this case.

We took the case up again and Your Honor will observe on the Second Amended Complaint, if you had an opportunity to read it, I think it is a very, very workmanlike document. It is obvious and evident there are many, many hours of work and research that has gone into the matter and to demonstrate how this is a continuing situation, I refer particularly to paragraph 24 on page 12 and paragraph 23 on page 7 where we set forth all of the things we tried to do to bring this matter together so we can present it to the court expeditiously.

We set forth the history of it. I have a sheet of typographical errors and omissions that we would sort of like to correct to this Complaint if Your Honor grants leave to file a Second Amended Complaint. We feel we want to give as good a document as we possibly can to the defendants.

Now, the defendants' objections, based upon the cases they have cited, Your Honor, are not applicable. This is certainly not that kind of case.

Secondly, the objections of the defendants' attorneys which have been filed by Mr. Gaylord Smith have, I think, made it evident they haven't read the Complaint.

They indicate there is no showing why we couldn't allege these matters earlier. This is to say the least, this is an unusual case and there has been a lot of diligent application to solve the many complex problems, both in fact and in law that exist in this case and because of that, Your Honor, we come forth and request the filing of a Second Amended Complaint.

I would address myself just briefly to the question of attorney's fees that has been raised by one of the three resident defendants.

This isn't a proper case for the award of attorney's fees, Your Honor, because we progressed with the case.

In a situation if we had done something in our pleadings or our requirements on the defendant, they exert themselves in an area where they hadn't been able to apply the research and diligence to the constructive study for the case, it would be a different situation.

Here we have addressed ourselves to the objections they have filed and we addressed ourselves to the matrix as Your Honor indicated in June so we could all come back to this basic Complaint to determine the propriety of the allegations of jurisdiction we have had in this case.

With the exhibits we have attached, this has been a continuous line of examination and study down one course and I think it will behoove the defendants' content [sic] that they have been put to any undue burden because of that.

I have the original, if I might approach the bench, of these typographical errors and omissions in the Complaint that we had and these have been discussed I think with some of counsel for the defendant.

THE COURT: These are merely typographical corrections?

MR. ECHEVERRIA: Yes, Your Honor. That's our motion, Your Honor.

THE COURT: Very good. Counsel —

MR. WIRTH: If it please the court, I will alleviate things. I don't think we need to address this in open court anyway.

I think the Points and Authorities demonstrate the very worst. Leave to amend could be conditioned upon reasonable conditions and I think more appropriately, the leave should be denied.

THE COURT: You are requesting that some of the Statute of Limitations applied were — I think the rule is clear. If I allow them in the court, it may relay [sic] back to —

MR. WIRTH: The court in the other case that we cited, the Prandini case, conditioned leave to amend on the agreement of plaintiffs' counsel that the Amended Complaint not relate back so far. I think the court has its discretion.

I think among the areas of discretion this court has are conditions upon leave to amend.

One of those conditions would be providing that the Amended Complaint go as of the point it is filed.

I would like to allude to the Forman vs. Davis case. By oversight, I didn't cite it in my responding Points and Authorities.

Page 230, 83 S. Ct. Rptr., U.S. Supreme Court indicated that leave shall be freely granted and then went on to say that among the factors to be considered are undue prejudice. That's one factor.

Another factor, though, is a failure to cure deficiency by amendments previously forwarded. You have to show precedence [sic] and they have to show they failed to amend.

Of course, in this case, the plaintiffs admit that they have the information upon which they base that Complaint in mid-1978. That's what they characterize in their original Complaint.

I think that carries forward, despite the records, they have financial resources and despite probably an estimate of twenty attorneys working on the case, they couldn't come up the first time around. I think Your Honor gave a lot of pointers in the twenty-three page decision.

They came back several months later with the Amended Complaint and are saying we don't like that Complaint either. I'm not a biblical scholar, but it makes me at least recall one thing. I think it was Moses, "How long, Lord, how long, Lord." How many times are we going to be here? How much are my clients to pay to see if he should even be here.

I'm speaking only of the three clients I am representing here today. They have expended themselves $6,725. That does not include the moneys expended by other clients upon whose behalf I'm not appearing for today.

These people are at a severe disadvantage in this case. They are the ones who are dependent upon the plaintiffs. They are not [sic] being litigated to death, including an extreme financial advantage.

Now, the award of those fees and costs that have been incurred by these clients in preparement and more particularly, I think it is more appropriate to deny leave altogether.

THE COURT: Mr. Smith.

MR. SMITH: Just a few short comments and my comments are directed to how the proposed Second Amended Complaint affects the personal jurisdiction arguments which we are making, which we have made in the form of a motion

to quash serve or summons and service of the First Amended Complaint.

The position of my clients is very simple; that if one reads the Second Amended Complaint very carefully, it has the same claims. It has the same causes of action that we have seen recast in various verbal labels two times before and that being the case, the only thing new of substance there is mere evidentiary denial.

The plaintiffs act as if they are doing us a favor by focusing the claims for us, giving us additional facts. Well, without being unduly sarcastic, Your Honor, I don't need that favor.

That kind of material can be more properly brought to this court's attention by way of affidavits in opposition to our motion for an order quashing service of summons and Complaint.

The reason why we so vigorously oppose what would seem to be maybe in another case somewhat routine motion is that this case is special.

What we have done so far with respect to motions to quash is file and prepare extremely lengthy and very thorough Points and Authorities directed to why the First Amended Complaint should be quashed just as the original one was. Why this is not a different situation, why the doctrine of direct estoppel describes [sic] so thoroughly, judgments must apply to this case.

We have in addition to the Points and Authorities prepared — my clients prepared four lengthy affidavits, out of state affidavits, fifteen to twenty pages a piece going through in great factual detail negativing the precise allegations contained in the First Amended Complaint.

Plaintiffs now tell us that that effort will be mooted by the Second Amended Complaint. I would use the word wasted.

This is a substantial economic effort that was went into on that motion, Your Honor. It will now have to be done again only because of the stylistic differences in the second proposed Complaint and I opposed that.

If one takes a look at what exactly goes into that proposed Second Amended Complaint, you find approximately six new pages, pages 7 through 12 addressed to the Statute of Limitations.

Well, I'm not sure what the Statute of Limitations has to do with my clients' motion to quash. I'm not sure what it has to do with the Rule 9 B motions that have been made by other defendants which I'm not terribly concerned about.

What it has to do is raise a question in my mind and I think in the court's mind as to what the real motive is. By doing us this favor of all this evidentiary detail and Statute of Limitations and other background facts which don't change the claims, I don't know what the reason is, Your Honor. I don't know what the motive is.

I do know I'm engaged in other litigation in New York and in California where I'm representing Chester Davis' attempt to enforce his claims against Summa Corporation for substantial fees and expenses owed to him pursuant to a 1961 agreement that he had with Hughes and with Hughes Tool Company. There have been counterclaims filed and by Summa and a motion to transfer has been made in New York to kick the New York litigation out to here, to Nevada, or alternately, to California. We are opposed to that. New York is inconvenient for Mr. Davis.

My perspective on the case, the reason for drawing out the Nevada action of avoiding the day of reckoning on the

motions to quash is to keep this action alive, viable as long as possible in order to enhance the tactible [sic] position of Summa in connection with the New York motion to transfer proceedings. I think if this court would begin to reach the same decision that it did on June 8, 1979, in its lengthy decision quashing service, the New York court might wonder just if Nevada is all that convenient for Mr. Davis. It assuredly is not.

For the reasons that the proposed Second Amended Complaint doesn't inject any new claims, all it injects is evidence which can be very easily brought before this court in the form of an affidavit in a motion to quash the proceeding and because there is no legally cognizable need for these amendments asserted by plaintiffs, I think the court would act well within its jurisdiction to deny leave to amend.

THE COURT: I must say, Mr. Smith, your points were an ingenious lack of prejudice. I point, for the purpose of the record, for counsel's edification, for we are now at what I call the F file. I have two and a half feet of file in this case. We have still not reached the request for service of process.

Secondly, regarding my last opinion was too lengthy, I must say it is not the court's best effort given pressed for time. We do have substantial matters involved.

I think, Mr. Smith, your assertion on the New York motion, I want to hear from Mr. Echeverria and furthermore, I would like to hear, Mr. Echeverria, if I should exercise indiscretion in favor of the plaintiff to compensate counsel for all expenses to date.

MR. ECHEVERRIA: As to the New York action that Mr. Davis filed in June of this year, 1977, an action in New York against Summa and Mr. Lummis for the fees that he contended were owed to him by Howard Hughes. That's

just a spur of the total action we have involved here and also involved in California.

Now, there is a motion to transfer the New York case to either Nevada or California, depending upon the outcome, but to hear counsel say that your order in June of 1979 was determinative of the issues in this case and has been comparable or equivalent to a res judicata finding which is totally inappropriate.

Your motion in June as I read it upon the facts, as I read it, the long armed [sic] jurisdiction for the State of Nevada that could be asserted could not be demonstrated, Your Honor.

Your Honor, I think you didn't intend in June, as I read your opinion, to have closed this action forever. That's why we came in as we have rather than electing to go on to appeal.

In the New York action, I think that's totally irrelevant. I don't think it has anything to do with this particular matter. It was an action filed six months after this case was filed. The one immediately suggests it is, to me their motive is a deploying action. Mr. Smith addressing himself to this case, a new cause of action hasn't been stated. We haven't tried to come in new. He says all we have done is allege more evidentiary detail.

As I understood the ball game, Your Honor, that was the ball game. The ball game was, Your Honor, indicated in the supporting affidavits we put with the Complaint which Your Honor stated the supporting affidavit to support the jurisdiction of facts, we haven't complied with the evidentiary detail. The Complaint talks about all the evidentiary detail to comply with the jurisdiction with the long arm statute within the State of Nevada. We didn't agree with what Your Honor said in the opinion, but we have taken

that as a text book and put down a new Complaint to prove right along with the standpoint of satisfying those requirements in which Your Honor considered we were deficient.

If we accept that law in this particular case, at this particular stage, we attempted to come to that point. Mr. Smith says these matters are to be more properly done by an affidavit. He objects to their being in the Complaint. That's a matter of how you are going to handle it. We took Your Honor's ruling that was made; the Complaint should be metrix [sic] and the affidavit should come into it. We tried to supply those matters. We can't satisfy Mr. Smith and his Honor at the same time.

THE COURT: I deem that's the court's feeling.

MR. ECHEVERRIA: I don't propose to satisfy Mr. Smith. If I do in this action, I'm going to look at myself to see if I'm doing my job properly.

With regard to Mr. Wirth's action, I address myself to the second section Your Honor asked me with respect to the fees Mr. Smith says we have.

There is a failure in this Second Amended Complaint to cure the deficiencies. That isn't a proper argument at this time. They could raise that by the Rule 45 motions and when they do raise it by the Rule 45 motion, whether or not we have cured the deficiencies in our allegations for sufficiency to satisfy the long arm statute will be determined by the court in another hearing. That's maybe properly how it should be done.

He said we admitted we had the information. That isn't what we admitted. We stated in April, 1978. The information first came to us June of '78. We had hired an expert.

We have continued the search for the records. Many of these records are in the defendants' possession; Davis & Cox and the attorneys have many records, testimonies, and

Mr. Gay and many other defendants, they have these records and we expect with discovery that there are additional facts coming in.

This isn't a fender bender. This isn't A hit B at the intersection of Third and Fremont. This involves hundreds of millions of dollars, involves many, many people and the scenario in which these people imposed themselves over a considerable period of time and a large amount of money is involved. This is a case that has to be structured, Your Honor, and put together.

Mr. Wirth's motion and appealing argument when he quoted from Moses, when Moses said, " How long, how long," Your Honor, how long will be longer if the filing of the Second Amended Complaint is denied at this particular time. We will go through an appeal and the entire processes there.

It would be better if we were to file the Amended Second Complaint and Mr. Wirth can come in with these contentions that we fail to cure the deficiency, if that's a proper position. We can demonstrate it before the court again if we haven't cured the deficiency.

Granting the motion to quash again with the request for attorney's fees, I say no, Your Honor. We are in litigation pursuing the original course set forth.

Had we done something in the presentation of our case that would have required these people to go through a futile effort. I would say, well, of course. Then this is subject to some consideration of unfairness on our part.

We have gone down exactly the same course of contention when we started in June of 1979. We have assimilated more facts.

Mr. Gaylord Smith says we prepared a lot of affidavits. He's better prepared now because of our filing the Second

Amended Complaint. Really, it has aided their clients' cause. Whether it is expensive is an unfortunate situation.

If you look at our contentions in the Second Amended Complaint, they took a lot of money out of the operation. This evidence, we contend this isn't a matter of considering it a $400 matter, the Denny's case, the Securities & Exchange Commission under Rule 10. This isn't that sort of case. It is a complex case involving a lot of money, a lot of people.

The Second Amended Complaint is very appropriate. I'm proud of the fact we have got this much this soon.

THE COURT: Counsel, Mr. Wirth, perhaps both you and Mr. Smith may be affected. How could the court possibly award attorney's fees at this point to counsel when we are really here as a courtesy and upon stipulation, not really in the action yet. We are still to determine whether they be served subject to our jurisdiction.

MR. WIRTH: I didn't make that clear, apparently, in my presentation. The $6,725 is the portion to be paid to us and L.A. counsel on behalf of three defendants. I'm appearing today. There has been more money than that.

THE COURT: I understand that. What I'm saying how can I order the bank to pay to your clients any compensation for attorney's fees at this juncture when you are still contesting you are under my jurisdiction.

MR. WIRTH: Defendants Gay, Glenn, Waldron —

THE COURT: I'm sorry. You are correct.

MR. SMITH: That's more appropriate for me to answer, Your Honor. My contention would be that the plaintiffs should pay for the privilege of having to — for getting to serve me with an amended pleading which I'll have to now move to quash and thereby waste a considerable amount of time and financial expense which went into the motion

to quash the previous document which they served on my client.

Rule 15 A or B expressly confers upoon this court the power to impose conditions and I think the literal terms of what will duly invest you with sufficient power to require plaintiffs to pay me as a condition for permitting them to file something with your Clerk.

I would say to the court that I frankly don't expect the court to award my clients all the attorneys' fees that they have actually put into the motion to quash because the court may be surprised that the counsel would spend as many hours in this as I, much in good faith, and can estimate my firm's expenditures were between eight and $10,000 in preparation of the affidavits and negotiations for the information that went into the affidavits, considerable legal research and revisions of the P's and A's, but half of that amount would certainly be indisputably fair and I think would have certain prophylactic impact on further attempts by Summa to make further motions.

THE COURT: There was an opporunity to file the First Amended Complaint. Since then, the situation changed somewhat. I would say that during the course the defendants have taken and all the research that they have undertaken to date, I don't think it would be contested that they have to re-evaluate this new Complaint and I'm thinking in terms of compensation. I'm curious what counsel's attempting and as my thought may be, one of the conditions would be the Complaint shall not be further amended. It could be supplemented, but not further amended. I'm not going to quote Moses, but, you know, we have to cut this off at some point, I think.

If I were to impose, let's say, Mr. Echeverria, the condition upon the plaintiff that there be no further amendments

save and except the proposed amendment of typographical errors in court and allow no further amendments and you compensate the defendants in the sum of $3,500, each of these, Mr. Wirth, and Mr. Smith, and respective counsels; would that be satisfactory in terms of justice? I'm inclined to think it would be.

MR. ECHEVERRIA: I think an award of $3,500, I don't think that they have satisfactorily proven the attorneys' fees.

THE COURT: Their time record is in there with the customary hourly rates which I'm sure are well in excess of that, Mr. Echeverria.

MR. ECHEVERRIA: We would like to cross-examine them to see it, Your Honor. I think it would be totally more appropriate an award of attorneys' fees be reserved for consideration by Your Honor until viewing further. I'm sure it is going to get into discovery beefs.

THE COURT: I might reserve to hear a motion to quash.

MR. ECHEVERRIA: I couldn't intrude upon Your Honor's prerogative there. With respect to the condition on failure to amend that supplemental pleading, that doesn't bother me. I view this as a case, Your Honor, where we are going to have a lot of new facts which will develop down the road.

We haven't gotten into our own records in this particular case yet. We haven't seen what the records and some of these defendants' testimonies have been. When we get into the records, Lord only knows what is going to come out of Pandora's Box.

Mr. Smith goes to 15 B as a condition for fee and I see nothing in there that talks about it; that's an amendment to conform with the evidence.

What I'm going to do and when it comes down the road and runs into evidence and seeks an amendment to the evidence, the only cause I see would be precluded from the benefits of Rule 15 B, if we get evidence down the road, we have to amend our Complaint and supplemental Complaint in the furtherance of the contention made and what if we find something in discovery, if we have to amend the evidence pursuant to Rule 15 B. It would foreclose that right. I don't think that would be a proper limitation.

THE COURT: Anything further?

MR. WIRTH: Only insofar as the point which these fees are awarded. I think the question presented today is whether the Amended Complaint will be permitted to be filed. I think this is the point, that we should get over that hurdle and not someplace down the road. I respectfully submit, I think it is a matter of examination, cross-examination, so on and so forth in my experience with this court.

MR. SMITH: I am perfectly willing to submit to the court a detailed affidavit of the hours spent in general subject matters of research and areas of affidavit preparation, together with billing rates and that kind of information.

THE COURT: Well, here we go. I grant the motion for leave to file and another Amended Complaint is going to have certain conditions.

Number one, is that the Amended Complaint to be filed will conform to the proposed Amended Complaint together with a list of typographical corrections exhibited to the court today. That will be accomplished within the next ten days.

Secondly is that the condition as each defendant as represented by Mr. Wirth and Mr. Smith will be compensated up through a maximum of $3,500 per defendant; that it is, however, conditioned upon submission to the court and to

opposing counsel an affidavit of hours expended and the customary hourly rate as pertains to this case.

Finally, no further amendments will be granted unless upon extraordinary cause — not just good cause, but extraordinary cause. I can't conceive of a situation, Mr. Echeverria, that leave will be further granted. I suppose it is possible, but not likely.

Finally, all briefing schedules heretofore set under various motions to quash and so are all vacated. I am aware that counsel have been accomodating to each other and to the court with a delicate situation in setting down the briefing schedules. I hope that will continue. I simply await new schedules to be submitted by counsel. All current dates are, of course, vacated.

Mr. Echeverria, just in terms of observation, I take as well taken Mr. Smith's point that certain evidentiary matters are exactly that and I know there might have been some confusion when the matrix of the Complaint was spoken about. If your discovery or purging of these files should reveal evidentiary matters, they may be just that, but not matters of the pleading.

I'm saying, I will allow you leave to amend under extraordinary circumstances, not just good cause. I think the theory should be clear to everybody now. At least I hope.

MR. ECHEVERRIA: If a new cause of action arises —

THE COURT: It may well. I don't know. It would have to be extraordinary. Anything else?

MR. WIRTH: No, your Honor.

THE COURT: Affidavit of times and hours expended say

within the next ten days, would that be satisfactory? You will have an opportunity to examine those, counsel.

MR. ECHEVERRIA: Thank you, Your Honor.

* * * * *

ATTEST: Full, true and accurate transcript of proceedings had.

/s/ Debbie F. Bartlett, C.S.R. #62
DEBBIE F. BARTLETT, C.S.R. No. 62

Opposition

Office - Supreme Court, U.S.
FILED
OCT 26 1981
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Nos. 81-606

IN THE

Supreme Court of the United States

October Term 1981

DAVIS & COX, CHESTER C. DAVIS, MAXWELL E. COX, HOWARD M. JAFFE and D. MARTIN COOK,
Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE J. CHARLES THOMPSON, FIRST NATIONAL BANK OF NEVADA, as Nevada Co-Special Administrator of the Estate of HOWARD ROBARD HUGHES, JR. (Deceased), William R. Lummis, as Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr. (Deceased), and as Texas Temporary Co-Administrator of the Estate of Howard Robard Hughes, Jr. (Deceased), SUMMA CORPORATION, HUGHES AIR CORP. d/b/a Hughes Airwest, and HUGHES PROPERTIES, INC.,
Respondents.

RESPONSE TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA.

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Respondents.

RESPONSE TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA.

Respondents and Real Parties in Interest First National Bank of Nevada, Nevada Co-Special Administrators of the Estate of HOWARD ROBARD HUGHES, JR., *et al.*, respectfully pray that a Writ of Certiorari not be issued to review the opinion of the Nevada Supreme Court entered June 26, 1981.

STATEMENT OF THE CASE

This case poses the issue of whether it was unconstitutional for the Nevada trial court and Nevada Supreme Court to hold that petitioners had entered a general appearance in the action below by requesting discretionary relief and opposing certain non-jurisdictional motions. More specifically, petitioners waived their special appearance in the following manner:

1. Petitioners opposed, by formal motion and at oral argument, respondents' (plaintiffs' below) motion to amend their original complaint. Petitioners did so, not solely on jurisdictional grounds*, but, as the Nevada Supreme Court expressly found, on the ground that granting leave to amend would have a "prejudicial effect. . . on a related action petitioners had filed in New York against Summa," and on the ground "that the allegations in the proposed second amended complaint were identical to those in the then filed first amended complaint." (Petition for Certiorari Appendix A at 4).

2. During oral argument before the trial court, petitioners' counsel asked the court to exercise its discretion in petitioners' favor; he asked for attorneys' fees as a condition for leave to amend the complaint. (*Id.* at 4).

3. Petitioners filed papers opposing respondents' Motion for an Extension of Time.

4. Petitioners appeared and argued at the hearing on these motions.

These actions occurred in the following context.

On January 24, 1979, respondents filed suit against the "palace guard" of attorneys, aides and doctors who

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*Even if it had been wholly based on jurisdictional grounds, the correct means with which to oppose jurisdiction on an amended or any complaint was a Motion to Quash.

surrounded Hughes in the last years of his life. Three of the present petitioners, Cox, Jaffee and Cook were not named. (Petition for Certiorari at 5).

On June 8, 1979, the trial court issued an interlocutory decision quashing service as to Davis & Cox and Chester Davis, (among others). Thereafter, prior to the entry of any order quashing service, respondents filed a first amended complaint.* Though petitioners filed new motions to quash (repeating their earlier conclusary denials of wrongdoing), these were not decided since respondents sought leave to file a second amended complaint to clarify their allegations and particularly to meet a Rule 9(b) motion (failure to plead fraud with specificity) filed by the Nevada resident parties. The same judge who had earlier granted petitioners' motion to quash service of summons of the original complaint, granted respondents leave to file the second amended complaint.

It was at this point that petitioners' counsel went beyond the motions to quash and sought relief which the trial court and a unanimous Nevada Supreme Court ruled constituted a general appearance. No such ruling was made obviously as to the other non-resident defendants, who did not oppose leave to amend nor request attorneys fees.

After the Nevada Supreme Court affirmed the trial court's ruling on July 2, 1981, petitioners filed a motion to stay remittitur pending application for certiorari to this Court. On July 23, 1981, the Nevada Supreme Court denied the stay, citing the dangers inherent in the passage of additional time before trial (which include outright dismissal of plaintiff's case for failure to bring

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*Admittedly, plaintiffs below could have chosen to seek review of the decision by petitioning the Nevada Supreme Court to issue a writ of mandate to the trial court. Instead, plaintiffs chose to comply with the trial court's direction to improve their complaint.

it to trial within five years of the filing of the first complaint, N.R.C.P. Rule 41(e)).

Associate Justice William H. Rehnquist of this Honorable Court also subsequently denied petitioners request for a stay. The defendants had until August 13th to file a responsive pleading in state court. Rather than do so, they filed a "proposed amended counterclaim" in the United States District Court of Nevada asserting an alleged federal claim and on the basis of that counterclaim (since diversity jurisdiction was lacking and plaintiffs pleaded no federal claims), removed the entire action from the Nevada state court to federal court. This occurred nearly three years after plaintiffs filed their original complaint in state court. Needless to say, the federal court granted respondents' motion to remand the action to the Nevada trial court.

REASONS THE WRIT SHOULD NOT BE GRANTED; THE GENERAL APPEARANCE ISSUE.

I.

THE DECISION BELOW FOLLOWS AN UNBROKEN LINE OF AUTHORITY IN NEVADA AND ELSEWHERE, AND DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

A. *By Resisting Plaintiffs' Motion for Leave to Amend, As Well as Plaintiffs' Motion For an Extension of Time, and By Affirmatively Requesting the Trial Court To Exercise Its Discretion and Award Attorney Fees and Costs as a Condition of Granting Leave, The Davis & Cox Parties Waived Their Special Appearance.*

After plaintiffs filed their original Complaint on January 24, 1979, the petitioners moved to quash service of summons contending that Nevada lacked personal jurisdiction. (Petitioners' Appendix A at 2 - 3). The trial

court issued an interlocutory decision quashing service as to that complaint. (*Id.* at 5). Thereafter, prior to the entry of any order quashing service, plaintiffs *FNB, et al.*, filed a First Amended Complaint. (*Id.* at 3). The defendants all filed new motions to quash service of summons, but before the lower court considered these motions, plaintiffs sought leave to file a Second Amended Complaint. (*Id.*). Petitioners Davis & Cox, *et al.*, as well as the Nevada *resident* defendants, opposed that Motion and a motion by plaintiffs for an extension of time. They filed papers with the court and appeared and argued, and, contrary to impression petitioners leave in their Petition for Writ of Certiorari (at 7), "sought attorneys' fees from Summa as a condition for leave to amend the complaint." (*Id.* at 4). The trial court, which had earlier quashed service of process, granted leave to amend and subsequently ruled that those actions by the Davis & Cox parties in opposing plaintiffs' motions and in seeking fees constituted a waiver of their special appearance. The Nevada Supreme Court affirmed.

B. *Counsel for the Davis & Cox Defendants, Instead of Merely Moving to Quash Service of the Second Amended Complaint, Deliberately Chose a Course Which — Despite More Than Ample Warnings From the Trial Court, Counsel for Fellow Defendants, and Settled Case Law — Clearly Constituted a General Appearance.*

The Nevada Supreme Court's holding that the petitioners waived their special appearance in these circumstances was not a "novel application" of Nevada's special appearance rule and certainly was not "contrary to . . . prior precedent," as petitioners argue. (Petition for Certiorari at 10 and 12). Rather, the Nevada courts have repeatedly held that a specially-appearing defendant must confine his papers to "jurisdictional matters of defective service or void judgment." *Doyle v. Jorgensen*, 82 Nev. 196, 414 P.2d 707 (1966); *Deros v. Stern*, 87 Nev.

148, 483 P.2d 648 (1971). *See also, Brockman v. Second Judicial District Court*, 65 Nev. 781, 201 P.2d 299 (1948); *State ex rel. Thatcher v. Justice Court of Reno*, 46 Nev. 133, 207 P.2d 1105 (1922); *Abell v. Second Judicial District Court*, 58 Nev. 89, 71 P.2d 111 (1937). Nevada case law clearly establishes that the request for "more relief than the mere quashing of service" constitutes a general appearance. *Selznick v. Eighth Judicial District Court*, 76 Nev. 386, 355 P.2d 854, 855 (1960). The Nevada Supreme Court in the instant case stated, "We have held that when a defendant seeks relief additional to that necessary to protect him from service of process, he enters a general appearance." (Petitioners' Appendix A at 4, citations omitted).

The courts of many states employ a similar standard, and many of them have routinely ruled upon the precise issue involved here. *Howe v. Lisbon Savings Bank*, 13 Vt. 48, 29 A.2d 816 (1943)*; *Inter-Ocean Casualty Co. v. Liles*, 218 Ala. 179, 118 So. 328 (1928); *Long v. Newhouse*, 57 Ohio St. 348, 49 N.W. 79, 81 (1897). These decisions all represent the conclusion that, in applying the general "waiver rule," opposition to a motion for leave to amend constitutes a waiver of a special appearance, since a defendant in resisting leave seeks "a favorable ruling upon a matter within the cause, not merely collateral thereto." *Howe v. Lisbon Savings Bank*, 29 A.2d at 818. Counsel for petitioners therefore acted in complete disregard of Nevada precedent, as well as nearly unaminous weight of authority in other jurisdictions.

Petitioners similarly ignored the authorities which hold that a request for attorneys' fees and costs, by a specially appearing party also waives a special appearance. *See, e.g., Howe v. Lisbon Savings Bank, supra.* By requesting fees a party implicity requests the

*Note that Vermont has fairly recently adopted a rule like F.R.C.P. Rule 12 which abolishes the distinction between special and general appearances.

court to exercise its discretion in his favor and recognizes the court as having jurisdiction of the cause and person for all purposes. (Nevada Supreme Court opinion, Petitioners' Appendix A at 5). A contrary conclusion would likely extinguish the distinction between a special and a general appearance, or at least would abandon the reasoned principles which courts use in making the distinction between the two.

The Davis & Cox petitioners sought fees and costs in the teeth of the warning by the trial judge. (Petitioners Appendix A at 4 and Appendix F at 60-61). counsel for certain fellow defendants, setting an example which petitioners should have followed, had previously refused to join in the request for fees for his specially appearing clients, but had requested fees only for the generally appearing, resident defendants. (*Id.*).

Thus, the procedure the petitioners complain of follows an unbroken line of authority, and is of so venerable and unquestioned propriety, as to make petitioners' challenge to it insubstantial and unimportant. Indeed, the Nevada Supreme Court apparently regarded the constitutional issue as so insubstantial and unimportant as to be unworthy of even a word or two. (Petitioners' Appendix A).

II.
PETITIONERS' ARGUMENTS ABOUT UNFAIRNESS ARE WITHOUT MERIT.

A. *A State May Properly Distinguish Between a General and Special Appearance and May Limit a Specially Appearing Defendant In What He May Do In the Forum Court Which He Contends Has No Jurisdiction Over His Person.*

Petitioners have argued that the exercise of jurisdiction over them interferes with the "due process right not to be sued" in Nevada. They have argued that

this right may not be waived by the application of state procedure which supports no legitimate state function. Yet, they have utterly failed to explain in what sense there is lacking any legitimate state purpose in the waiver rule, and particularly have failed to demonstrate any arbitrariness in the application of the waiver rule to them or any general unfairness in the rule itself, let alone having shown unfairness of a degree offensive to the due process clause.

The Davis & Cox parties appear to argue chiefly that the ruling in question was a novel application of the "waiver" principle. They appear to have abandoned their contention that the mere inavailability of motion practice to oppose leave to amend itself denied them due process.

Respondents have already demonstrated that the application of the "waiver" rule in the instance was hardly novel nor unforseeable. Counsel for the petitioners, unlike counsel for their co-defendants, appear to have taken a calculated risk in opposing leave to amend and the request for an extension of time and in seeking fees and costs. Petitioners cannot honestly maintain that the courts' holding in this instance was unforesseable; they can merely grouse (and not properly before this Court) that their gamble did not pay.

As for the second and apparently abandoned assertion, we note that this Court has accorded great deference to general state procedure. *See, e.g.*, Wright and Miller, *Federal Practice and Procedure:* Civil §4023; *Cf., York v. Texas*, 137 U.S. L5 (1890); *Weskin Life Indemnity Co. v. Rupp*, 235 U.S. 261 (1914). Generally, this Court has held that a party must follow state rules of procedure prescribing the method for making a special appearance or for resisting jurisdiction. *Adam v. Saenger*, 303 U.S. 56, 67 (1938). The Davis & Cox parties chose a course other than that provided by Nevada Law. If they contend as they did below that by the mere fact that some

procedural courses of conduct were proscribed by Nevada, on penalty of waiver of their special appearances, they were somehow denied due process of law, they must cite authority or at least offer an explanation for this proposition.

The fact is that, in addition to collateral benefits they hoped to derive in a related New York proceeding which they had initiated, the Davis & Cox parties in opposing leave to amend appear to have hoped to capitalize on Rule 9(b) problems (failure to plead fraud with specificity) in plaintiffs' first amended Nevada complaint, which plaintiffs would have been unable to cure had they not been permitted to amend. In any event, petitioners certainly did not face "certain defeat," as they argued to the Nevada Supreme Court, on the jurisdictional issue by the mere inability to contest leave to amend, if in fact their jurisdictional objections were well taken in the first place.

The only claim of unfairness in the "waiver rule" which the petitioners articulated below, was their exclamation that the rule would expose every defendant to:

> The tender mercies of a plaintiff who is free to send requests for admission on jurisdictional issues, or to move for partial summary judgment on parts of the claim having particular jurisdictional significance. To oppose these unilateral activities would be a general appearance; not to oppose them would guarantee certain defeat.

They reiterate that argument at pages 9 and 10 of their Petition for Certiorari. This argument also bears on their claim that *res judicata* effect should apply to an interlocutory decision quashing service of process. Petitioners' fears have no foundation. Plaintiffs did not

engage in that form of unfair conduct*, and the decisions of the Nevada Supreme Court make clear that it would not countenance such abuse. *Abell v. Second Judicial District Court*, 58 Nev. 89, 71 P.2d 111 (1937); *Doyle v. Jorensen*, 82 Nev. 196, 414 P.2d 707 (1966). Should any trial court permit such abuse (which is unlikely in the first instance), the Nevada Supreme Court has made clear that it would vindicate a defendant's refusal to enter a general appearance, by answering interrogatories for example, and would vacate or set aside the void judgment or order unfairly gained. *Id.*; *See also, Gardner v. Associated Contractors*, 72 Nev. 1, 291 P.2d 105 (1956).

Nevada's special appearance rule provides protection from the assertion of jurisdiction and provides a defendant with a full opportunity to litigate that question. However, Nevada appropriately exacts a cost for that protection of jurisdictional rights:** It proscribes a defendant from otherwise proceeding as a defendant for all purposes without in fact being one. The waiver rule prevents a party from unfairly jabbing from behind

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*Respondents FNB, *et al.*, did propound interrogatories to petitioners simultaneously with the service of their original complaint, only naturally since at that stage it was not clear that petitioners would resist jurisdiction. Subsequently, in order to preserve the testimony of two aged witnesses, respondents noticed and took their depositions, but stipulated that no general appearance would arise therefrom. Respondents also served additional interrogatories and requests for admission in December 1979, but only because petitioners by that time (to be more precise, a month earlier) had waived their special appearance. This apparently passes as the "host of procedural tactics (employed by respondents) having as their sole end the elimination — through a process of steady erosion — of petitioners' constitutional right not to be sued," or so petitioners exclaim. (Petition for Certiorari at 9, n.12).

**In Nevada the special appearance rule also protects a defendant from any discovery until the jurisdictional question is resolved. *Gardner v. Assoc. Contractors*, 72 Nev. 1, 291 P.2d 105 (1956).

a protective screen at a plaintiff as to other matters in the litigation, and it normally prevents the expenditure of judicial resources on matters which would ultimately become moot if at trial's end or at some subsequent stage of the proceedings the court decides that, afterall, it does not have jurisdiction. This only lightly touches upon the debate which has raged over the wisdom of the special/general appearance distinction, but it shows that it is a policy question which, for Nevada, is for Nevada to decide. Where the authorities cannot even agree as to the wisdom of the rule, it would be a mammoth step for this Court to conclude that the rule is so fundamentally unfair as to be constitutionally unsound.

In short, a state may determine for itself whether an appearance entered by a Defendant is of such a character as to prevent subsequent challenge to this jurisdiction of the Court. Restatement, Conflicts of Law §82; *Cole v. Randall Park Holding Co.*, 201 Md. 616, 95 A.2d 273 (1953). The Davis & Cox parties have simply given no adequate justification for departing from that time-honored rule, or have they demonstrated that it was employed unfairly or unforseeably in this case.

B. *The Nevada Courts In Ruling That the Davis & Cox Parties Had Waived Their Special Appearance Did Not Act Capriciously and Arbitrarily, Nor Did These Courts Apply "Novel Procedural" Rules "Retroactively," Nor Act Otherwise In Any Manner Offensive to Due Process.*

The Davis & Cox petitioners cite *Davis v. Wechsler*, 263 U.S. 22 (1923), for the proposition that a state may not set springes to baldly defeat plain constitutional rights. *Davis v. Wechsler* and other cases in that line of decisions create a standard for measuring unfairness. Such decisions help define the parameters beyond which a state may not go in setting state procedure. Nevada did not pass those bounds in this instance. Respondents have

outlined the facts of this case, and have shown how petitioners could have completly protected their jurisdictional objections through a motion to quash, but chose not to do so, and instead sought additional relief.

Those facts have a striking contrast with the facts of *Davis v. Wechsler, supra, N.A.A.C.P. v. Alabama, infra,* and the other decisions petitioners have relied upon in the full course of this litigation in arguing that they had been deprived of constitutional rights. For instance, *National Association for the Advancement of Colored People v. Alabama*, 357 U.S. 449 (1964), clearly involved a retroactive application of a procedural rule which had been unforeseeable and only ambiguously announced previously. The Alabama Supreme Court had refused, among other things to review constitutional questions raised by the N.A.A.C.P. in the Association's efforts to prevent its extinction in Alabama. The court had refused on the ground that mandamus was the proper mode for review, and the Association had failed to employ that means of review. Yet, the "inconsistency" of the Alabama court's prior holdings precluded any party from reasonably anticipating the state court's holding in the N.A.A.C.P. case.* *Id.* at 457. The unforseeability and novelty involved in *N.A.A.C.P. v. Alabama* is in stark contrast to the facts of the present action.

In *Brinkerhoff — Faris Trust and Savings Company v. Hill*, 281 U.S. 673 (1930) the state overruled its earlier decisions making a suit in equity to enjoin collection the only remedy against a discriminating tax violative of the equal protection clause, and then denied this remedy upon the ground that the party seeking it should first have exhausted an administrative remedy *which was earlier unavailable* and, under the overruling decision,

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*This Court expressly found that although certain Alabama decisions suggested that mandamus might be a possible means of review, "nothing in the prior state cases... suggested that mandamus (was) the *exclusive* remedy." (*Id.*)

was too late for him to invoke. This Court found that springe to violate due process, and no wonder. As this Court held, at 454:

> [W]hile it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

Nevada never deprived the petitioners "of all existing remedies for the enforcement of (their jurisdictional rights)," but instead provided them a full opportunity to air their jurisdictional objections through a motion to quash.

Davis v. Wechsler, 263 U.S. 22 (1923), involved a state springe which closed on the defendant *regardless* of what he did. A substituted defendant could not do anything but waive his objection to venue. Nevada, however, afforded petitioners much more than that illusory protection.

In *Monger v. Florida*, 405 U.S. 958 (1972), this Court dismissed a criminal appeal because "the notice of appeal. . . was filed prior to entry of either judgment or sentence." The tehnicality and state policy involved in *Monger* (which manifestly involved more eggregious circumstances that those in the present petition) served a less important purpose than the procedure involved in Nevada yet this Court refused to interfere with state procedure.

In short, although the Davis & Cox defendants persist in arguing that the holding that they waived their special appearance is the "kind of arbitrary, capricious, and retroactive application of novel procedural laws that

is abhorrent to the due process clause," they grossly misstate the case. They could have completely protected their jurisdictional objections under Nevada's procedure through a motion to quash. They had more than ample warning that they could not do more without waiving their jurisdictional objections, but chose not to do so. Instead, they sought addiional relief and have only themselves to blame for the waiver of their special appearance. That result is not unfair.

III.
PETITIONERS' ARGUMENT FAILS UPON ITS OWN PREMISE.

In the Nevada courts the Petitioners argued that they opposed plaintiffs' motion for leave to amend solely to protect their jurisdictional posture in Nevada.* The Nevada Supreme Court, in speaking of this assertion, disagreed:

> Our review of the record leads us to conclude otherwise. In resisting the motion petitioners (the Davis & Cox parties) argued that Leave to Amend should not have been granted because of the prejudicial effect it would have on a related action petitioners had filed in New York against Summa. They also contended that the allegations in the proposed Second Amended Complaint were identical to those in the then filed First Amended Complaint (which belied their claim that leave to amend would somehow prejudice their jurisdictional position)." (Petition for Certiorari Appendix A at 4).

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*Petitioners now seem to hedge in making this argument. (Petition for Certiorari, Question 1 at i). Their statement of the question in their brief may suggest, *for the first time*, that their actions in the trial need not have been solely jurisdictionally motivated.

Thus, as the Nevada Supreme Court found, the Davis & Cox parties' opposition to the attempt to amend was not solely jurisdictionally motivated, although the petitioners appear to continue in the face of the Court's finding of fact to argue otherwise. (Petition for Certiorari at i, 7, and 10). Petitioners have argued that due process permits a defendant to take *any* step in protecting against the assertion of jurisdiction *so long as that is his sole object.* Thus, even upon their own thesis the petitioners fail.

REASONS THE WRIT SHOULD NOT BE GRANTED; THE *RES JUDICATA* ISSUE.

I.

PETITIONERS' SUBSEQUENT GENERAL APPEARANCE MOOTED THE QUESTION OF THE *RES JUDICATA* EFFECT OF JUDGE GOLDMAN'S EARLIER DECISION TO QUASH SERVICE OF PROCESS.

The trial court, in June 1979, rendered an interlocutory decision quashing service as to these petitioners. (Petitioners' appendix A at 2 - 3). Subsequently, plaintiffs amended their pleading twice, the first time as a matter of right and the second time upon leave of court. (*Id.*) In opposing leave to amend and in requesting fees, petitioners waived their jurisdictional objections and there by rendered the issue of the *res judicata* effect of the June 1979 decision moot as to them. Petitioners' *res judicata* argument would not have been mooted had they merely raised it in a proper motion to quash.

II.
NEVADA'S RULE PERMITTING AMENDMENT OF A COMPLAINT BEFORE THE ENTRY OF ANY FINAL ORDER FOLLOWING AN INTERLOCUTORY DECISION QUASHING SERVICE OF PROCESS DOES NOT VIOLATE DUE PROCESS.

Respondents F.N.B., *et al.*, discuss this issue in detail in their Motion to Dismiss or Affirm in No. 81-561, an appeal to this Court by co-defendants to the present peitioners from a decision of the Nevada Supreme Court. For the sake of brevity, and because the issue is moot as to the present petitioners, respondents incorporate by reference that discussion as well as the relevant portions of the appendix in the Motion to Dismiss or Affirm in No. 81-561. For convenience, respondents append the pages of discussion from their Motion to Dismiss or Affirm.

PETITIONERS' APPLICATION HAS BEEN RENDERED MOOT BECAUSE, SUBSEQUENT TO THE DECISION OF THE NEVADA SUPREME COURT, PETITIONERS FILED MOTIONS TO DISMISS BASED ON NUMEROUS NON-JURISDICTIONAL GROUNDS AND THEREBY UNDENIABLY WAIVED THEIR JURISDICTIONAL OBJECTIONS IN NEVADA

On October 19, 1981 subsequent to the ruling of the Nevada Supreme Court which petitioners challenge, these petitioners filed in the Nevada trial court several motions based on numerous non-jurisdictional grounds. They moved to dismiss plaintiffs' complaint for: failure to state a claim upon which relief may be granted, for failure to plead fraud with sufficient particularity; for lack of standing; for failure to join indispensible parties; and upon several other grounds under N.R.C.P. Rule 12.

They filed motions to dismiss which manifestly involve the merits of plaintiffs' claims and which can be granted only upon the hypothesis that the Nevada trial court has jurisdiction over the cause and the person. Accordingly, because the precedent in Nevada and in every other state which distinguishes between a special and general appearance unanimously regards motion practice of this nature to constitute a general appearance, petitioners again waived their jurisdictional objections in this action. *See, e.g.*, 5 Am Jur. 2d Appearance §§16, 19, 21, and 28. There is nothing novel or unforseeable about this Rule. Therefore, petitioners have rendered their application moot.

CONCLUSION

Petitioners have failed to articulate a substantial federal question, nor have shown any unfairness in Nevada's procedure which, like that of many other states, distinguishes between a special and general appearance. Therefore, this Court should not issue a writ of certiorari to review the decision of the Nevada Supreme Court.

Respectfully submitted,

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APPENDIX

I.
NEVADA'S RULE PERMITTING AMENDMENT OF A COMPLAINT BEFORE THE ENTRY OF ANY FINAL ORDER FOLLOWING AN INTERLOCUTORY DECISION QUASHING SERVICE OF PROCESS DID NOT VIOLATE DUE PROCESS.

On December 19, 1979, the Nevada trial court granted appellees leave to file the Second Amended Complaint. The appellants afterward filed new motions to quash arguing that the trial court's earlier decision of June 8, 1979, quashing service of process over the defendants, constituted an estoppel by judgment determining once and for all that the State of Nevada has no personal jurisdiction over these non-resident defendants for causes of action alleged by appellees. Ultimately, like that trial court, the Nevada Supreme Court held that no *res judicata* effect attached, stating:

> An order quashing service of summons may be attacked only through a writ of mandamus. *Jarstad v. National Farm Union*, 92 Nev. 380, 552 P.2d 49 (1976). It is not a judgment as defined in our rules of civil procedure: "'Judgment' as used in these rules includes a decree and any order from which an appeal lies." N.R.C.P. 54(a). The time limit for filing an appeal, N.R.A.P. 4(a), does not pertain to a writ of mandamus; this extraordinary remedy is subject to the doctrine of laches. *Buckholdt v. District Court*, 94 Nev. 631, 584 P.2d 672 (1978). An order quashing service of summons is not treated as an appealable final judgment under our rules of civil procedure. (J.S. appellants' appendix A A-5).

The Court reasoned that, "Petitioners (appellants here) rely on a number of cases which find a direct estoppel to exist on a jurisdictional issue once decided. (Citations omitted.) However, in each of these cases the order quashing service was directly appealable and it

became a final judgment." (*Id.* at A-6). Accordingly, because the June 8, 1981 decision quashing service had not been final, the Nevada Supreme Court held that the district court had not erred in refusing to apply the *res judicata* doctrine.

In June of 1979, after the trial court quashed service of process, three Nevada residents still remained as defendants in the action. The trial court issued no Rule 54(b) certificate, N.R.C.P. Rule 54(b), either on its own motion or upon an application by the appellee/plaintiffs. Rule 54(b), like the federal rule which it copies, expressly contemplates the trial court's reconsideration of a ruling in an action as this, involving multiple claims and multiple parties, at any time before a final judgment. Moreover, even before the entry of the interlocutory orders stemming from that decision quashing service, plaintiffs had filed an amended complaint.

Nevada's procedure regarding the interlocutory nature of an order quashing service is not remarkable. Numerous other courts have applied precisely the same procedure in circumstances nearly identical to these. (*See* also Restatement of Judgments §44). For instance, in *GMS Properties, Inc. v. Superior Court*, 219 Cal.App.2d 407, 33 Cal.Rptr. 163 (1963), the Supreme Court of California held that a successful motion to quash did not bar litigation of jurisdictional questions after amendment of the complaint. "(Q)uashing of service of the first summons did not result in the question of jurisdiction becoming *res judicata* for the reason that no judgment of dismissal followed the ruling and that through additional allegations in the second amended complaint, the situation was changed so that there then was an adequate pleading." 219 Ca. App. 2d at 410, 33 Cal.Rptr. at 166. In *accord*, *see Stevens v. Security Pacific National Bank*, 538 F.2d 1387, 1388 (9th Cir. 1976); *Lone Star Motor Import, Inc. v. Citroen Cars Corp.*, 288 F.2d

69, 77 (5th Cir. 1961) (the trial court was directed to allow amendment to cure jurisdictional defects; no prejudice had resulted as to preclude the granting of leave to file an amended complaint, even though the defendant had been required to do extensive research to prepare a trial brief and even though the trial court had expended its time and energies); *American Broadcasting Co. v. Wahl Co.*, 121 F.2d 412, 413 (2nd Cir. 1941) (order not final where leave to amend is granted*). None of these decisions even hint that any constitutional deficiency may exist in the procedure adopted by Nevada; indeed, they would not so hint since the Nevada practice is analogous to the sustaining of a demurrer with leave to amend, a practice sustained without question through hundreds of years of practice.

Appellants persist in contending that in Nevada a plaintiff may litigate the issue (of jurisdiction) *ad infinitum"* (J.R. at 11), and refer to the possibility of a plaintiff's making a *prima facie* showing of jurisdiction upon the "hundredth litigation of the issue." (J.S. at 20). Appellants' contention has no basis in reality. Additional amendments of a complaint are not a matter of right but are granted within a trial judge's discretion. N.R.C.P.

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*See also *Haley v. Simmons, 529 F.2d 78, 79 (8th Cir. 1976) (court which grants motion to quash but does not dismiss action "retained jurisdiction for purposes of allowing further attempts to serve process); United States v. Desert Gold Mining Co.* 433 F.2d 713, 715 (9th Cir. 1970) (order granting partial summary judgment was subject to "reconsideration and revision" by "the same judge, a successor judge or a different judge to whom the case might be assigned"). Nor is the court bound to follow the June 1979 decision as "law of the case." That doctrine is purely discretionary, and the court may reexamine its decision until final judgment (*See, Hill v. United States Fidelity and Guaranty Co.*, 428 F.2d 112, 115 (5th Cir. 1970) and 400 does not apply where, as here, the facts and issues before the court have changed. *See, Petition of Kinsman Transit Co. v. City of Buffalo*, 388 F.2d 821, 825 n.9 (2d Cir. 1968). Finally, "it is questionable whether (law of the case) ever applies unless the (first determination) affects the merits." *Boling v. United States*, 231 F.3d 926, 928 (9th Cir. 1956).

Rule 15(a). As the trial judge in the instant action himself made clear in granting plaintiffs' motion for leave to amend, Nevada courts simply will not permit repeated amendments without good cause. Indeed, he granted leave upon the express condition that no further amendments would be permitted except upon the showing of "extraordinary cause." (Reporters transcript of Proceedings, November 20, 1979, Appendix A at A-48). The arguments of the Gay parties that the court's discretion constitutes no limitation upon the number of times a party may replead and, accordingly, upon the number of times a defendant will be required to resist jurisdiction by motion, posits the entirely unacceptable premise that the courts of Nevada cannot be trusted to wisely and fairly exercise their discretion. The defendants thus offer a slim excuse for interference with Nevada public policy and procedure, particularly since, even if endless amendment were permitted in Nevada, no such abuse occurred in their case.

Appellants exclaim that the unfairness of Nevada's rule "could not be more obvious and compelling." (J.S. at 21). They cite, as a standard for measuring that unfairness, *Davis v. Wechsler*, 263 U.S. 22 (1923). That case stands for the proposition, with which appellees agree, that a state may not set springes in the guise of procedural rules to defeat plain constitutional rights. In ruling that an order quashing service of process is in Nevada an interlocutory order, the Nevada Supreme Court as well as the trial court did not act capriciously, arbitrarily, or otherwise in any manner offensive to due process. Nevada set no springe in this instance. The Nevada courts simply provided plaintiffs the opportunity, the first time they amended, to correct defects and oversights in their jurisdictional allegations, and, the second time they amended, to correct potential Rule 9(b) deficiencies (failure to plead fraud with specificity) in order to resist certain defendants' motions to dismiss. In each instance, the appellants were free to

contest jurisdiction through proper motions to quash, although this likely entailed some additional cost (even though their subsequent papers traced their first nearly word for word). That falls far short of the unfairness necessary to constitute a violation of due process.

The instant appeals have a striking factual contrast to *Brinkerhoff - Faris Trust and Savings Company v. Hill*, 281 U.S. 673 (1930). There the state had overruled its earlier decisions making a suit in equity to enjoin collection the only remedy against a discriminating tax violative of the equal protection clause, and then denied this remedy upon the ground that the party seeking it should first have exhausted an administrative remedy *which was earlier unavailable* and, under the overruling decision, was too late for him to invoke. This Court found that springe to violate due process, and no wonder. As this Court held, at 454:

> (W)hile it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

Nevada never deprived the appellants "of all existing remedies for the enforcement of (their jurisdictional) rights," but instead provided them a full opportunity to air their jurisdictional objections through a motion to quash.

Davis v. Wechsler, 281 U.S. 673 (1970), appears to rest upon the same principle. In that case this Court held that the mere required formality of substituting a new director general of railroads could not serve to waive the plea as to venue, where the substituted defendant fairly

contemporaneously adopted that previously filed plea. The state's procedure effectively destroyed all opportunity for any substituted director general of railroad to protect his objection to venue, pursuant to the federal General Order 18-A. That state springe closed on the defendant *regardless* of what he did. Again, in the instant action, Nevada afforded much more than the illusory protection involved in *Wechsler*.

Finally, one last decision, *Monger v. Florida*, 405 U.S. 958 (1972), helps define the parameters beyond which a state may not go in setting state procedure. In *Monger* this Court dismissed a criminal appeal because "the notice of appeal. . . was filed prior to entry of either judgment or sentence." The technicality and state policy involved in *Monger* (which manifestly involved more eggregious circumstances than those in the present appeal) certainly served a less important purpose than the procedure involved here. Nevada's procedure permits a plaintiff, if he acts timely, to cure defects in a pleading wherever circumstances would make it just, N.R.C.P. Rule 15(a), (for example, to help cure defects in pleading fraud). That opportunity to amend would be meaningless if the plaintiff could not then re-serve a defendant with process.

In short, the appellants suffered no real hardship under the Nevada rule, certainly none of a constitutional dimension. This Court need not rewrite Nevada's procedure permitting amendment of pleadings and defining what orders will be accorded finality.